



# OFFICE OF THE STATE CORONER

## FINDINGS OF INQUEST

**CITATION:** Inquest into the death of Isabella Wren Diefenbach

**TITLE OF COURT:** Coroners Court

**JURISDICTION:** Rockhampton

**FILE NO:** 2010/1790

**DELIVERED ON:** 19 September 2012

**DELIVERED AT:** Rockhampton

**HEARING DATES:** 21 July 2010, 17-21 October 2011, 19 March 2012

**FINDINGS OF:** AM Hennessy, Coroner

**CATCHWORDS:** Coroners: inquest, inspection of decks and verandahs in rental properties for structural integrity; responsibilities and practices of real estate agents in inspections and receipt of expert reports and attending to repairs, accidental death of baby.

### REPRESENTATION:

Counsel Assisting: Ms A Kirkegaard

For Next of Kin: Mr Gerry Mullins (Instructed by Maurice Blackburn)

For O'Reilly's Real Estate: Ms J Rosengren (instructed by Rees R & Sydney Jones)

For Damien LAGOS: Mr Jeff Clarke (instructed by South & Geldard)  
(Owner)

These findings seek to explain, as far as possible, how the death of Isabella occurred on 29 May 2010. Consequent on the court hearing the evidence in this matter, where learnings indicate that changes can be made to improve safety and changes to practices and procedures, recommendations may be made with a view to reducing the likelihood of a similar incident occurring in future.

I express my sincere condolences to the family of Isabella for her tragic loss.

### **THE CORONER'S JURISDICTION**

1. The coronial jurisdiction was enlivened in this case due to the death coming within the categories of section 8 of the *Coroners Act 2003* (“the Act”) as Isabella’s death was of “*violent or unnatural death*” and section 9 of the Act. A Coroner has jurisdiction to investigate the deaths under section 11(2), to inquire into the cause and the circumstances of a reportable deaths and an inquest can be held pursuant to section 28.
2. A Coroner is required under section 45(2) of the Act when investigating a death, to find, if possible:-
  - the identity of the deceased,
  - how, when and where the death occurred, and
  - what caused the death.
3. An inquest is an inquiry into the death of a person and findings in relation to each of the matters referred to in section 45 are delivered by the Coroner which includes a finding about the circumstances in which the person died, as distinct from the means or mechanism by which the death occurred. The focus of an inquest is on discovering what happened, informing the family and the public as to how the death occurred, but not on attributing blame or liability to any particular person or entity.
4. The Coroner also has a responsibility to examine the evidence with a view to reducing the likelihood of similar deaths. Section 46(1) of the Act, authorises a Coroner to “*comment on anything connected with a death investigated at an Inquest that relates to – (c) ways to prevent deaths from happening in similar circumstances in the future.*” Further, the Act prohibits findings or comments including any statement that a person is guilty of an offence or civilly liable for something.
5. Due to the proceedings in a Coroner’s court being by way of inquiry rather than trial, and being focused on fact finding rather than attributing guilt, section 37 of the Act provides that the Court may inform itself in any appropriate way and is not bound by the rules of evidence. The rules of natural justice and procedural fairness apply in an inquest. The civil standard of proof, the balance of probabilities, is applied.
6. All interested parties can be given leave to appear, examine witnesses and be heard in relation to the issues in order to ensure compliance with the rules of natural justice. In this matter, Isabella’s parents, O’Reilly’s Real Estate, and the owner of the house were represented at the Inquest.

7. I will summarise the evidence in this matter. All of the evidence presented during the course of the inquest, exhibits tendered and submissions made have been thoroughly considered even though all evidence or submissions may not be specifically commented upon.
8. Isabella Wren Diefenbach was a seven week old baby who died from head injuries sustained in an accidental fall from her father's arms while he was standing on the verandah of their home on 29 May 2010. The incident occurred at the family's home at 12 Spring Street, Yeppoon ("the property") which the Diefenbachs rented the property through O'Reilly's Real Estate (ORRE), who were engaged by the owner, Damien Lagos, to manage the property.

#### **Issues examined by the inquest:**

9. It was determined at the pre-inquest conference on 18 July 2011 that the inquest would examine:
  - (a) the findings required under section 45(2) of the *Coroners Act 2003*; and
  - (b) the obligations of tenants, lessors and letting agents in respect of the maintenance and repair of residential rental properties.
10. It was not disputed that the findings required to be made under the Act permitted an examination of the circumstances leading to Isabella's death, including:
  - i. the extent of the tenants' concerns about the condition of the front verandah and the extent to which these concerns were communicated to ORRE personnel;
  - ii. the adequacy and timeliness of the response of ORRE to the identification of wood rot in the front verandah;
  - iii. the adequacy and timeliness of Mr Lagos' response to the identification of wood rot in the front verandah; and
  - iv. the circumstances in which the board failed on 29 May 2010.

#### **THE EVIDENCE**

##### **The property:**

11. The property at 12 Spring Street Yeppoon was a three bedroom high set timber frame, fibro sheeted dwelling on timber stumps. The front door is accessed by a set of open platform stairs leading to an uncovered front verandah at the northern end of the dwelling. The verandah was constructed from timber decking boards, timber balustrade with lattice infill and timber handrails. The dwelling could also be accessed from a rear entrance into the kitchen by a set of open stairs leading to a covered back verandah similarly constructed to the front verandah.
12. Damien Lagos, the owner of the property, is a young man who works as an exploration driller for a Rockhampton-based company. He generally worked

three weeks away from Yeppoon and one week off. He often worked in remote areas where contact by phone or email was problematic and irregular. Mr Lagos' mother, Rachel Prins, was actively involved in her son's affairs due to his work. Ms Prins would check his mail to assess whether it was something that needed to be dealt with before he was due home, and otherwise leave it for him to collect when he returned.

13. Ms Prins' evidence was that generally she didn't have much contact with Mr Lagos while he was away for work because she often couldn't contact him. If she needed to speak with Mr Lagos during these times, she would phone him after 6:00pm and at times it would take a day or more for him to return the call.
14. Mr Lagos purchased the property on 18 August 2006. It was previously owned by the mother of a friend of his and he had visited the house several times. Ms Prins' involvement in the purchase was limited to engaging CQ Building & Pest Inspections Pty Ltd to conduct a pre-purchase building and timber pest inspection of the property. These inspections were performed by an inspector under the indirect supervision of Casey Van Hese on 16 August 2006.
15. The pest inspection report noted active termites and it rated the risk of termite infestation to the overall property as "*moderate to high*". It noted no evidence of previous termite treatment or barrier system and it rated the drainage to be generally "*inadequate*". The pest inspection report recommended a range of remedial actions.
16. The building report rated the property to be in "*good to fair*" condition overall. The front verandah assessment rated the decking as "*good*". Its only recommendation about this structure related to the posts contacting the ground.
17. Mr Lagos said he would have briefly perused these inspection reports. He had no concerns about the inspection findings and did not use them to negotiate any pre-settlement rectification work or reduction in contract price.
18. Mr Lagos moved into the property and lived there with friends (who paid him rent) until late December 2007, when he decided to use it as a rental investment property. Mr Lagos did not make any improvements to the property while he lived there and didn't experience many recurrent maintenance issues. He did some work on the property to ready it for tenants. No maintenance or repair work was done to the front verandah at this time.
19. Mr Lagos says he used the front verandah "*all the time*" because it was the main access point to the house. There were a couple of old lounges out there that the previous owner had left behind. Both the front and back verandah were places that Mr Lagos and others used when having a drink or a party. He never experienced any problems with the front verandah while he lived there.

20. Mr Lagos did not notice any deterioration in the condition of the front verandah decking boards while he lived at the property. Counsel Assisting showed him a photograph of the front verandah taken on 20 December 2009 which shows a large hole in one of the decking boards (the 14<sup>th</sup> board from the house) near the western end of the verandah. Ms Diefenbach described the hole depicted in that photograph as being 15cm long and 5cm wide. The possible dimensions of the hole were further qualified by Robert Lilliboe, an experienced licensed builder who inspected the property in March 2010. His estimate of its size, having regard to exhibit B3.2.1, photograph 12, was that the whole area of damage was about 25cm long in total, tapering at an angle to a hole through the board of about 16cm x 2-3cm. The hole is not specifically mentioned in the 2006 building and pest inspection reports. Mr Lagos says while it is possible the hole was there during his occupancy of the property, if it was there he didn't notice it and it did not affect his use of the front verandah.
21. Mr Lagos's evidence, together with the findings of the pre-purchase building and pest inspections done in August 2006, indicate that as at December 2007, the condition of the front verandah decking was such that it did not compromise the amenity of that area or pose an imminent safety risk.

**Engagement of O'Reilly's Real Estate & terms of property management agreement:**

22. On 7 December 2007, Mr Lagos engaged O'Reilly's Real Estate, Yeppoon ("ORRE") to let and manage the property on his behalf. This was the first time Mr Lagos had used a real estate agent to manage an investment property. Mr Lagos's recollection about his initial dealings with ORRE about the property is limited and does not extend far beyond signing documents.
23. Section 6.3 of the property management agreement enabled ORRE to pay repairs and maintenance to a maximum value of two weeks rent. ORRE were authorised to engage tradespeople at their discretion as Mr Lagos did not nominate specific tradespeople to carry out emergency repairs. Mr Lagos admits he did not read the documents carefully. At best he had a very general understanding of his legal obligations as a lessor.
24. As at December 2007, Mr Lagos was working at the Capcoal Mine and resided at the Middlemount Camp during roster. He worked day shifts from 6:00am to 6:00pm. Mr Lagos had both mobile coverage and internet access when at the camp. Mr Lagos and his mother recall making ORRE aware of his work situation and contact arrangements which consisted of contacting Ms Prins if Mr Lagos was not able to be reached. Mr Lagos gave his mother full decision making authority in relation to the property through an informal understanding between them. Mr Lagos was comfortable with his mother making decisions about the property without discussing them with him first. In practice, Ms Prins spoke to Mr Lagos before making decisions with significant cost implications, e.g. accepting a reduced weekly rent and installing air conditioning, security screens and flyscreens. Under cross-examination by

counsel for the family, Ms Prins said that the detail of her decision making authority would not have been spoken about at the meeting with ORRE.

**ORRE property management practices:**

25. ORRE is a licensed real estate agency in Yeppoon owned and operated by Ross and Judy O'Reilly. It comprises both sales and property management divisions, managed by Mr O'Reilly and Mrs O'Reilly respectively. As at December 2007, the agency employed a full time receptionist, an unknown number of sales consultants and four property managers.
26. Property managers must hold a certificate of registration under the *Property Agents and Motor Dealers Act 2000*. In order to qualify for registration, a person must complete an industry recognised property management training package. REIQ provides a registration course that meets the education requirements determined by the Office of Fair Trading. It appears there are eight other registered organisations that also provide the registration course.
27. ORRE manages about 385 rental properties. 50-60% of these properties are owned by people who do not live locally.
28. The inquest heard evidence from three of the property managers involved in the management of the property at 12 Spring Street, Yeppoon – Briny Hawkes, Hannah Matheson and Chantal Stevens – and the receptionist, Jana Hawkes.
29. The property management division of ORRE used the software program Console Gateway (“Console”) that was specifically designed to assist real estate agencies in the management of rental properties (used by approximately 80% of real estate agencies in Queensland). The program contains features which assist in the monitoring and tracking of outstanding tasks such as maintenance issues and allows property managers to contact tenants, landlords and contractors via SMS or email and to record this information on file. ORRE also subscribed to and used PM Boss to supplement its Console software. PM Boss is a Property Management Procedure Manual which contains extensive information in relation to property procedures, forms, letters and checklists.
30. There were three separate files maintained in respect of this property, namely a paper file which included a landlord section and a tenant section (to store original documents), a server file and a Console file. Within the Console file, three files were created, namely the landlord file, the tenant file and the property file which were linked. When a task was created it was recorded on Console, but in which file it was recorded varied depending on where the task was created. Two electronic files were necessary because Console does not have the capacity to efficiently store all electronic documents relevant to the management of any particular property. This system of maintaining three files, was widely used in the real estate industry.

31. ORRE property management division held weekly in house meetings to undertake training and to review outstanding issues in relation to the various rental properties.
32. It was the procedure at ORRE to post routine inspection reports to landlords which were recorded in the mail register without the report/s being specifically identified in that record.
33. ORRE has since changed many of the practices which existed in the property and sales sections (detailed in a statement provided by Judy O'Reilly) and the internal communication and recording of information within the firm. The agency used different computer systems in the property and sales sections, which systems were not interlinked.
34. Mr Lagos' property was leased twice over the period January 2008 to June 2010. Over this period, five different property managers dealt with issues arising in respect of the property – Angela Jennings, Sophie Hawkes, Briny Hawkes, Hannah Matheson and Chantal Stevens.

**The first tenancy – Nicole Maas:**

35. The property was leased to Nicole Maas for 12 months commencing on 4 January 2008 and for a second 12 month period. Ms Maas lived in the property with her two teenage sons. Sophie Hawkes had the most frequent contact with Ms Maas. Ms Maas' statement made claims about the poor condition of the front verandah and her communication of concerns about it to ORRE that are not supported by either the agency file produced to the court, her oral evidence or the oral evidence of other witnesses.
36. Ms Maas' statement referred to several occasions when her high heel shoe went through the decking boards on the front verandah (witnessed by her neighbour Treymayne Rosin). Ms Maas did not complete any paperwork about these concerns, but stated she raised them with Sophie Hawkes during several routine inspections and would often call the ORRE office to have the problem rectified. No work was done to the front verandah during her occupancy of the property, other than the replacement of two of the front stair treads.
37. Ms Rosin and her partner, Lawrence Haas, helped Ms Maas move furniture downstairs at the end of her tenancy. In statements given to Police shortly after Isabella's death, both state that Ms Maas warned them about the front verandah decking. Ms Rosin states she could see it was rotten, with some areas worse than others. Mr Haas recalled one of the decking boards was "*very spongy under foot, as if it was almost about to break under my weight*". He says Ms Maas mentioned she'd complained to the real estate agent about the verandah.
38. Ms Maas had been renting in Yeppoon since 1995. Consequently, by the time she took a lease on the property at 12 Spring Street, Yeppoon, she

considered she had a good understanding of her rights and obligations as a tenant.

39. Ms Maas completed an entry condition report on 7 January 2008. It indicates the house was not clean, showed considerable signs of wear and tear and the yard was overgrown. Her primary concerns at that time were about getting the property screened. The report notes smoke alarms were yet to be installed. The entry condition report generated by ORRE contains an entry for “2 x timber decks”, which are marked “*undamaged*” and “*working*”.
40. Ms Maas did not notice a hole in the front verandah when she moved in and cannot recall having seen the hole depicted in exhibit B3.2.1, photograph 12, during her tenancy.
41. The agency file shows ORRE conducted routine inspections of the property on 17 April 2008, 21 July 2008, 9 October 2008, 21 January 2009 and 1 May 2009. The reports indicated that Ms Maas was a clean and tidy tenant. In each report the “verandah/balcony” was marked “*satisfactory on visual inspection*” apart from some loose stair footings (January 2009). The agency file shows ORRE sought instructions from Mr Lagos about that structural repair issue but there is nothing to indicate he or Ms Prins subsequently authorised them to arrange the repairs but Ms Maas remembers the stair treads being repaired.
42. Ms Maas told the court that her concerns about the front verandah developed over time. In her opinion the decking was rotting as it seemed softer to walk on. She said she had verbally reported the heel incidents during inspections but her concerns about the front verandah are not documented in any routine inspection reports. She raised her concerns about the front verandah in the context of a number of concerns she had in respect of overall property maintenance.
43. Ms Maas says her concerns about the safety of the front verandah were such that she did not use it often and she voiced her concerns to her sons, her mother (who visited the property) and other guests. Despite her concerns, her sons continued to use the front door “*probably every day*”, she sometimes sat out on the front verandah and it was also used during a teenage birthday party, though Ms Maas says she tried to encourage the kids to stay on the back verandah on this occasion.
44. Ms Maas’ conduct during the tenancy does not sit with the notion of her having serious safety concerns about the property. She renewed the lease without raising the issue in the pre-inspection letter, did not issue a Notice to Remedy Breach about the issue, and did not raise any concerns with the owner or his mother when they were at the property. Further no mention was made of the issue at the Small Claims Tribunal hearing for the termination of the lease.
45. Sophie Hawkes and Hannah Matheson deny that Ms Maas raised any concerns about the front verandah during their routine inspections. The

agency file indicates Ms Maas' repair and maintenance concerns related primarily to other maintenance issues. The agency file shows ORRE staff responded promptly to Ms Maas' various repair and maintenance concerns by attempting to contact Mr Lagos or Ms Prins as soon as the issue was notified to them and actioning his or her instructions by issuing work orders as soon as they were given.

46. Ms Maas did not mention any concerns about the verandah to Ms Prins or Mr Lagos on the occasions that each of them attended the premises.
47. It is clear from the agency file that Mr Lagos spent several thousand dollars on improvements and repairs and maintenance during Ms Maas' tenancy. Mr Lagos told the court that he was not troubled by this expenditure as the house was tenanted for tax purposes.
48. On 15 September 2009, due to a change in her personal circumstances (and not safety concerns), Ms Maas sought to break the lease and an order of the Small Claims Tribunal was made terminating the lease on 16 October 2009. Ms Maas completed the exit condition report and returned it to ORRE on 16 October 2009. The copy of the report attached to her statement shows an entry for "2 x timber decks (*front rotting*)" marked "*clean*", "*undamaged*" and "*working*". Ms Maas told the court that her notation "*front rotting*" referred to the condition of the whole verandah, but she cannot explain why she also ticked "*undamaged*" and "*working*". This document is signed only by Ms Maas. Ms Maas told the court that she took a photocopy of exit condition report before she returned the original but conceded under cross-examination by counsel for ORRE that she had no independent recollection of providing the report to ORRE. The agency file does not contain a copy of it or any indication of a final version signed by ORRE.
49. It is clear that Ms Maas had some concerns about the verandah but it is apparent from the evidence that her reporting of the issue was not prominent in her dealings with the agents and owners and was in the context of overall property maintenance.

#### **Subsequent pre-tenancy inspection of the property:**

50. Briny Hawkes was a senior property manager who had been employed with ORRE since February 2009. She also had property management experience with other real estate agencies. Ms Hawkes carried out a pre-tenancy inspection of the property and prepared an entry condition report in preparation for the Diefenbach's tenancy. The entry condition report contains an entry for "2 x timber decks" as "*undamaged*" and "*working*". Ms Hawkes could not recall seeing the hole depicted in exhibit B3.2.1, photograph 12. She did not think it was there when she did the pre-tenancy inspection as "*..if I saw something like that, I would have made a note of it on the entry condition report*" and "*..when I took it back to the office, I would have contacted the owner and asked if I could get repairs done.*"

### **The Diefenbach tenancy:**

51. As at October 2009, Adam and Jennifer Diefenbach were renting another property through ORRE from which they decided to move due to a rent increase. They submitted a tenancy application to ORRE on 27 May 2009 and were well known to several of the ORRE property managers as they had previously rented properties managed by ORRE and were considered good tenants. ORRE discussed the Diefenbach's tenancy application with Ms Prins, who gave approval to let the property to them. The Diefenbach's application was approved and the property was leased to them for 12 months commencing on 7 November 2009.

### **Condition of the property at the start of the Diefenbach tenancy:**

52. Ms Diefenbach completed the entry condition report on 10 November 2009 and returned it to ORRE that day. She made detailed comments about the condition of the property including that the house was not clean, showed considerable signs of wear and tear, the yard was overgrown and there were white ants present. Ms Diefenbach noted "*front deck rotten bit of wood, loose step, hole in wall – egged*". She told the court this ("*rotten bit of wood*") was a reference to the hole depicted in exhibit B3.2.1, photograph 12. She cannot recall when she first noticed the hole but thought it was probably on the first day they moved in. Ms Diefenbach's intention was that, by noting these items on the entry condition report, they would be fixed.
53. Mr Diefenbach's statement to police described the front verandah as being in disrepair when they commenced the tenancy and "*looked like the timber was rotting from water damage*". His subsequent statement to the coroner describes it as "*quite old and weathered*". He refers specifically to a hole in a board in "*the middle area of the verandah (about the 14<sup>th</sup> board from the front door)*". His statement describes the hole as "*approximately 15cm long and 7cm wide and looked jagged at its edges*" and appended a photograph showing the hole.
54. Neither of the Diefenbachs had any building expertise or knowledge about the nature of wood.
55. Ms Diefenbach says she received a copy of the entry condition report in the post about a week after the inspection. She noticed some of her comments had been crossed out, so she phoned ORRE straightaway to query this and spoke with Briny Hawkes. Briny Hawkes' recollection is that she phoned Ms Diefenbach on 10 November 2009 (noted in ORRE phone records) to ask whether the house had been cleaned, as she had organised a cleaner to attend the property. It transpired that the cleaner had attended the wrong property. Ms Hawkes says Ms Diefenbach also raised some maintenance issues during that conversation relating to the laundry taps, a leaking shower nozzle, white ants on the hot water system and trees scraping against the roof. Ms Hawkes is definite in her recollection that she had this conversation before she posted the entry condition report to the Diefenbachs and further, that Ms Diefenbach did not mention the front verandah during this

conversation. Ms Diefenbach conceded under cross-examination by counsel for ORRE that she had no independent recollection of the conversation with Ms Hawkes and more specifically, about whether she mentioned the front verandah during this conversation.

56. Ms Hawkes says she crossed out items on the entry condition report (but neglected to sign it) and posted a copy back to the Diefenbachs on 13 November 2009 under a covering letter.
57. On 13 November 2009, Ms Hawkes issued work orders to various tradesmen to deal with the issues she says she discussed with Ms Diefenbach. She spoke to Ms Prins about these issues, and the records indicate that these work orders were being progressed over the next month or so.
58. Mr Lagos says he did not receive a copy of the entry condition report until after Isabella's death. Ms Hawkes confirmed she did not send a copy to him as agency practice at that time was only to send a copy to the owner on request. Mr Lagos says had he received the report he would have been surprised by its contents and would probably have arranged a carpenter to look at the front verandah.
59. The entry condition report provided the first documented notification of wood rot in the front verandah. That it was not acted upon at this early stage in the tenancy was at the very least, poor property management practice on the part of Ms Hawkes.

**Extent and frequency of Diefenbach's use of the front verandah during the tenancy:**

60. Mr Diefenbach stated they mainly used the front verandah as a thoroughfare to enter the house from the front of the property and accessed the front verandah frequently, including the area where the incident later occurred. Mr Diefenbach says he had taken Isabella out onto the front verandah many times prior to the incident on 29 May 2010.
61. Ms Diefenbach gave a different account of the extent of their use of the front verandah. She told the court that until the third trimester of her pregnancy, they didn't use the front verandah very often as they tended to use the back stairs, especially when they were bringing groceries into the house. Family members visited the house at least once or twice a week and used both entrances. She says they rarely used the small outdoor table and chairs on the verandah depicted in exhibit F5, and they never entertained out there. Ms Diefenbach says she made a conscious effort to avoid the area near the hole depicted in exhibit B3.2.1, photograph 12, but because of the orientation of the front screen door (which swung outwards), it was where she would stand if she was exiting the house with another person. Under cross-examination by counsel for ORRE, Ms Diefenbach confirmed her disagreement with Mr Diefenbach's statement and said that after Isabella was born, although they used the front verandah to access the house, the day of Isabella's death was

the first time Mr Diefenbach had ever taken Isabella out on the front verandah to settle her.

62. At no stage did the fact of the presence of wood rot in the front verandah ever give rise to a concern by the Diefenbachs that it posed an imminent safety risk and further, did not prevent them or their visitors from regularly using the verandah to enter and exit the house throughout the tenancy. Ms Diefenbach acknowledges that as at late May 2010, she did not consider there was a risk that anyone would be injured in the near future because of the condition of the front verandah.

#### **Termite inspection on 19 November 2009:**

63. One of the work orders generated by Briny Hawkes on 13 November 2009 was for a termite inspection by Active Pest Control (Qld) Pty Ltd. Mr Ken Trotter, a qualified pest technician and owner of Active Pest Control (Qld) Pty Ltd, inspected the property on 19 November 2009 and provided an inspection report. Mr Trotter stated that while he is qualified to identify the presence of wood decay, he is not qualified to assess the risk posed by it and his reports recommend that the owner should seek expert advice from a builder about a finding of wood decay.
64. Mr Trotter located an active termite nest in a tree on the eastern side of the property. His report identified extensive termite damage in the sub floor, out buildings, fences, trees and gardens. He did not see any signs of previous termite treatment and considered the ant caps were inadequate. He assessed the risk of termite infestation to the overall property to be "*extremely high*". Mr Trotter found wood rot in areas including step treads, step stringers, verandah (front) and landing flooring, floor joists and verandah posts. He also saw other signs of moisture in four decking boards adjacent to, and north of, the hole (depicted in the photographs) which was evident as a darkening of the timber.
65. Mr Trotter phoned ORRE to notify them of the active termite nest and to seek authorisation to treat it immediately and was given authorisation to proceed with treatment, which he did before he left the property. Ms Prins authorised the treatment but was not told anything about wood rot (the conversations are not documented on the agency file).
66. Mr Trotter subsequently prepared an inspection report, a treatment proposal and a treatment certificate and provided these to ORRE. He recommended a range of remedial actions that were essentially the same as those recommended in the CQ Building & Pest Inspections report in August 2006. Hannah Matheson says she received Mr Trotter's report and arranged for it to be posted to Mr Lagos at his mother's address on 2 December 2009 (noted in the mail register).
67. Ms Matheson did not read the termite inspection report. She confirmed Briny Hawkes' evidence that property managers had been instructed not to read building, pest and termite inspection reports because they were not

qualified to interpret them. This was confirmed by other evidence from the agency owners and the trainer. The staff were required only to send a copy of the report to the owner for the owner to action if the owner wanted to. It was not agency practice to provide the tenant with the report.

68. Mr Lagos stated that he did not receive a copy of Mr Trotter's report until after Isabella's death. Ms Prins initially maintained that they did not receive the report at all, but soon conceded it was possible she had seen it but probably would not have bothered reading it because *"..they're really big reports and they're full of so much rubbish.."*. She recalled a conversation with Mr Lagos at around the time of the termite inspection about the cost of the termite barrier and his intention to get it done but *"not just at the moment"*. She agreed it was possible Mr Lagos had read the inspection report and seen that costing. In his oral evidence, Mr Lagos says he did not recall seeing the report and vaguely recalled the conversation with his mother about the termite barrier. He could not recall whether he read the termite barrier costing in the termite inspection report but conceded under cross-examination by counsel for ORRE that he possibly did.
69. The termite inspection finding of the presence of wood rot in the front verandah is independent confirmation of the rot noted by Ms Diefenbach in the entry condition report. This inspection provided a second opportunity during the Diefenbach's tenancy for the condition of the front verandah to be investigated.
70. Unfortunately, then current ORRE property management practices, specifically:
- i. the directive not to read building and pest inspection reports;
  - ii. the task-allocation (rather than portfolio allocation) division of labour amongst four property managers; and
  - iii. a procedure that did not communicate inspection outcomes to the tenant
- created a sup-optimal situation where:
- (i) the wood rot finding, supported by photographic evidence, was not seen by a property manager or recorded on Console Gateway;
  - (ii) the property manager who was best placed to consider the finding against knowledge of Ms Diefenbach's notation on the entry condition report, Briny Hawkes, was not made aware of the report;
  - (iii) there was no process by which the findings were highlighted for the owner's consideration and further instructions; and
  - (iv) there was no communication of the inspection outcomes back to the tenant.
71. Under cross-examination by counsel for family, Ms Matheson acknowledged the potentially serious consequences of the then current directive not to read pest inspection reports:

*“So then if an adverse pest inspection report come in to your office identifying a problem with steps, or boards of decking or verandas, and it’s sent out to the owner, and there’s no response, wouldn’t it just be the case that no-one would ever act upon it? – Yes.”*

72. Even had Ms Matheson been permitted to read the report, her lack of involvement in the entry condition report process may still have resulted in a failure to ‘connect the dots’ between the wood rot finding and Ms Diefenbach’s notation about the condition of the front verandah. Briny Hawkes herself acknowledged during cross-examination by counsel for the family that the hole depicted in exhibit B3.2.1, photograph 12 (which was the same one photographed by Mr Trotter) “..would suggest that that board would probably need replacing.”
73. If one accepts Mr Lagos’s after-the-event statement that had he been aware of the “rotten wood” notation on the entry condition report he would probably have arranged for a carpenter to look at it, then it is arguable that if he read the report, the agency actively highlighting the termite inspection findings for his attention and further instructions may have encouraged him to investigate the condition of the front verandah.
74. ORRE could and should have made greater effort to bring the inspection findings to his attention and proactively seek his further instructions rather than merely sending out the report without follow up.
75. It is noted that since this incident, ORRE has maintained the directive about not reading the reports, but now sends inspection reports under a covering letter that recommends the lessor read the report carefully and liaise directly with the author of the report in relation to any issues of concern, and any matters which require clarification or to discuss any recommendations.

#### **The appraisal of the property for sale:**

76. Mr Lagos made a decision in December 2009 to sell the property, informing the agent on 21 December 2009. Ms Richardson and another sales consultant, Katie O’Reilly, attended the property on 22 December 2009 to do a sales appraisal. The agency file contains an entry notice for a ‘valuation’ to be done on that date.
77. The evidence of both Mr O’Reilly and Leisa Richardson is clear that as at December 2009, ORRE did not have a formal process whereby the sales team reviewed the property management records for a rental property that was being listed for sale. Leisa Richardson did not recall reviewing the agency’s landlord file for Mr Lagos or the property management file for the property. She recalls a discussion with Hannah Matheson who mentioned Mr Lagos was a bit difficult to contact and that the bathroom leak was being attended to. She was not aware of the November 2009 termite inspection report.

78. Ms Richardson thought the property was very presentable and did not recall there being anything needing to be done before it was listed. Ms Richardson's statement indicates she did not notice any defects with the front verandah when she walked through the property that day (about a 15 minute stay). Ms Richardson definitely did not recall seeing the hole depicted in exhibit B3.2.1, photograph 12.
79. Mr Lagos signed a sales agent appointment agreement on 23 December 2009. The property was advertised for sale on 31 December 2009.

### **Contact Issues**

80. Mr Lagos openly acknowledges that he was difficult to contact during both the Maas and Diefenbach tenancies. He conceded that he took very few, if any, proactive steps during the tenancies to instruct ORRE personnel about the best method and time to contact him about the property. He was heavily reliant on his mother's involvement as an alternate contact, conduit of information and decision maker.
81. Ms Prins states she was aware of and understood occasional frustration on the part of the ORRE property managers about the difficulties they had contacting Mr Lagos, and indeed she acknowledged her own frustration at times about his uncontactability. Despite this, Ms Prins did not have a discussion with Mr Lagos at any time during the Maas or Diefenbach tenancies about these difficulties, as she felt ORRE would always come to her anyway. There is no dispute that Ms Prins was readily contactable and provided prompt instructions when she was contacted in relation to the property prior to February 2010.
82. However, by early February 2010, Ms Prins became frustrated about the frequency of contact by ORRE about maintenance issues. She explained this frustration by comparing the two tenants – she described Ms Maas as a very easy, polite tenant, whereas she felt Ms Diefenbach was not happy with the house at all and Ms Prins just couldn't seem to do anything to please her. Ms Matheson confirmed that she considered Ms Diefenbach's complaints were reasonable in the context of a property that needed a lot of maintenance and Briny Hawkes considered the issues Ms Diefenbach raised with her were reasonable.
83. By this time, Mr Lagos's work pattern changed and he was based in a more contactable location, so she felt there was no longer a need for ORRE to come to her as he would be able to handle things.
84. Ms Prins says she made it clear to Mr Lagos that she no longer wished to be involved in the property management issues and it was time for him to start looking after it. Ms Prins' evidence suggests that Mr Lagos rarely spoke to her about property management issues after this time. Ms Prins acknowledged she did not expressly instruct ORRE to no longer contact her from that point on. This explains why there is no specific note in the agency

file about the change in Ms Prins' involvement. The agency file documents no further contact with her after early February 2010.

85. It is clear that ORRE personnel did not take this or any other opportunity to clarify with Mr Lagos the best method and time to contact him about the property. The evidence also shows Hannah Matheson did not escalate the issue among her colleagues and the sales consultants with a view to trying to find a solution to their shared difficulties in contacting Mr Lagos.

**Extent of Ms Diefenbach's complaints to ORRE personnel about the front verandah:**

86. Mr Diefenbach's statement to police indicated they didn't say anything to the real estate agents about the front verandah until three or four months prior to Isabella's death. The Diefenbach's application to the coroner for an inquest ("inquest application") refers to Ms Diefenbach's recollection of phoning the ORRE receptionist, Jana Hawkes, in or about late November 2009 after receiving no response to the issues raised in the entry condition report. The application suggests she spoke to Ms Hawkes about her request that the front verandah be fixed, among other issues. Thereafter, Ms Diefenbach phoned the agency once a week for the following three – four weeks. The agency file does not document any specific complaints from the Diefenbachs about the front verandah prior to the first routine inspection on 1 February 2010.

***Complaints to ORRE receptionist, Jana Hawkes***

87. At the inquest, Ms Diefenbach had little, if any, independent recollection of either the frequency or specifics of her contact with Jana Hawkes about the front verandah. Rather, she appeared to reconstruct her memory, indicating that she would have used her attendances at the office to pay rent as an opportunity to reinforce specific outstanding maintenance issues, or she would have phoned the office about them. Her initial point of contact in both scenarios was always Jana Hawkes.
88. Under lengthy cross-examination by counsel for ORRE, Ms Diefenbach struggled to recall precisely how many times she complained to ORRE – her evidence was ultimately that she was in contact with ORRE at least once a week "*about something*" and there was definitely at least one occasion during December 2009 when she complained about the front veranda, but she could not recall who she made that complaint to or any details about what she said on that occasion.
89. Ms Diefenbach estimated that she attended the office to pay rent on about 10 occasions during the tenancy. She generally could not recall specifics of her conversations with Jana Hawkes on these occasions (other than one occasion when Ms Hawkes was newly pregnant), but steadfastly maintained that she always raised the need for the front verandah to be repaired, amongst other outstanding maintenance and repair issues such as the sunlight cover and the bathroom leak. She estimated that she specifically mentioned the hole in the front verandah to Ms Hawkes on at least five of

those visits to the office. Ms Diefenbach says Ms Hawkes always told her she would email Hannah Matheson about it.

90. She estimated there were possibly five other occasions, including when she reported the incident involving her mother-in-law, when she attended the office and complained about the front verandah. She says she dropped off repair request forms on two of these occasions – one in March and one a few weeks after the second routine inspection – and these forms mentioned the need for the front verandah to be repaired, along with other outstanding maintenance and repair issues such as the sunlight and the pest control, but has no specific recollection of having given these forms to Jana Hawkes on either of these occasions.
91. Although Jana Hawkes recalls speaking to Ms Diefenbach in person and on the phone on a number of occasions, she does not recall Ms Diefenbach mentioning concerns about the front verandah prior to early May 2010, when Ms Diefenbach reported the incident involving her mother-in-law.
92. At the inquest, Ms Hawkes had very little, if any, specific recollection of her interactions with Ms Diefenbach during the tenancy. Ms Hawkes denied the possibility that she may not have documented every contact with her by Ms Diefenbach about the front verandah. In doing so, she relied on what her usual practice then was, namely to always send an email to the relevant property manager about any issue raised by a tenant as soon as practicable after contact with the tenant. Ms Hawkes agreed with the proposition put to her by counsel for ORRE that she would likely have recalled something like the frequency with which Ms Diefenbach says she complained about the front verandah.
93. Hannah Matheson did not recall receiving emails from Jana Hawkes about this extent of contact from Ms Diefenbach about the front verandah or receiving two repair requests delivered by Ms Diefenbach outside of the two routine inspections (the issue of the receipt of repair requests at the time of routine inspections is dealt with below). Ms Matheson considered that Jana Hawkes would have complied with office procedure and passed on all messages she received from Ms Diefenbach about the property.
94. Ms Diefenbach was consistent in her position that she regularly raised a range of outstanding maintenance and repair issues with ORRE via Ms Hawkes, as her first point of contact with ORRE. The agency file documents various maintenance and repair issues reported through Ms Hawkes over time, though none of these prior to Ms Diefenbach's report of the incident involving her mother-in-law documents specific concerns about the front verandah. The evidence is clear that there were ongoing maintenance issues for this property, some of which were raised by Ms Diefenbach via the entry condition report and others emerging thereafter.
95. The evidence is also clear that Ms Diefenbach was vigilant in identifying, reporting and following up progress on these various issues. While Ms Diefenbach's identification of the presence of wood rot in the front verandah

via the entry condition report was certainly an outstanding issue, the weight of the evidence does not support a finding that Ms Diefenbach specifically reported concerns about the need for the front verandah to be repaired as often as she claims.

96. The more likely scenario is that when following up various outstanding maintenance and repair issues over time via Ms Hawkes, Ms Diefenbach has not articulated the outstanding front verandah repair issue as a safety/amenity issue requiring immediate attention and action by ORRE. This is evidenced by the fact that notwithstanding the family's concerns about the condition of the front steps and the front verandah, the Diefenbachs and their visitors regularly used these structures to enter and leave the house during the tenancy. It appears that Ms Diefenbach has attempted (in good faith) to reconstruct her dealings with ORRE on this issue but her recollections do not completely accord with the other evidence, which is in part also vague as to the specifics.
97. The submission from the family argues that the absence of documentation of complaints by Ms Diefenbach as recorded by ORRE personnel is likely to be a consequence that Ms Diefenbach has not specifically articulated the outstanding front verandah repair issue as a safety or amenity issue requiring immediate attention and action by ORRE at the time of the follow up by Ms Diefenbach. After initially identifying the matter as a safety issue, she followed up the progress of repairs without reinforcing the nature of the complaint. Counsel for the family submit that the credibility of Ms Diefenbach on this issue should not be undermined by poor record keeping of ORRE.

#### ***Complaints to ORRE sales consultants, Katie O'Reilly and Leisa Richardson***

98. The Diefenbach's inquest application suggests Ms Diefenbach voiced concerns about the front verandah to both Leisa Richardson and Katie O'Reilly when they attended the property after it had been listed for sale. Ms Diefenbach told the court that she recalled speaking with both agents when they attended the property to take photographs for the purpose of listing it for sale.
99. There is no dispute that Ms Diefenbach spoke to Katie O'Reilly about other maintenance issues which Ms O'Reilly reported to one of the property managers on her return to the office. The agency file shows Briny Hawkes followed this up with Hannah Matheson on 29 December 2009. Leisa Richardson says she subsequently reported the termite damage issue to Hannah Matheson, who told her the property had already been treated.
100. There is a dispute about whether Ms Diefenbach communicated her concerns about the condition of the front verandah to either or both of these agents during the sale process. Ms Diefenbach says she definitely mentioned her general concern about some loose treads on the front stairs and some visibly weathered, rotten looking boards on the front verandah to Leisa Richardson and actually pointed some of these areas out to Leisa, including the hole depicted in exhibit B3.2.1, photograph 12. Ms Diefenbach could not recall on

which occasion when she did this. Leisa Richardson denies this occurred. Ms Richardson says she did not notice the hole in the front verandah during her attendances at the property.

101. Ms Diefenbach conceded she may not have mentioned her concerns to Katie O'Reilly. Katie O'Reilly states that Ms Diefenbach never complained to her about the front verandah. Ms Diefenbach says she "*would have*" mentioned her concerns about "*the stairs and the verandahs*" during her phone conversation with Leisa Richardson on 30 January 2010. Leisa Richardson denies this was discussed during this conversation and her file note does not contain any reference to issues relating to the front verandah.
102. Given Ms Richardson's acknowledgement that the sales consultants were "*..interested in keeping [Ms Diefenbach] happy..and looking after the tenant*", it is reasonable to suggest that had Ms Diefenbach raised concerns about the front verandah with them during the sale process, the agents are likely to have communicated those concerns to Hannah Matheson, just as they did with Ms Diefenbach's other concerns about the other issues. The weight of the evidence indicates that Ms Diefenbach is likely honestly mistaken in her recollection of having specifically raised her concerns about the front verandah with Leisa Richardson either in person at the property or during the phone conversation on 30 January 2010.

#### ***Complaints to maintenance property manager, Hannah Matheson prior to 7 May 2010***

103. The Diefenbach's inquest application suggests Ms Diefenbach continued to phone Ms Matheson about the condition of the front verandah following the first routine inspection in February 2010.
104. Under cross-examination by counsel for ORRE, Ms Diefenbach specifically recalled one occasion when she spoke with Hannah Matheson while at the office paying her rent. She recalls this occurred in 2010. Ms Diefenbach says she gave Hannah a list of issues that she thought needed repairing, including the need to repair the front verandah, and asked when those issues were going to be attended to. She recalls Ms Matheson told her she would get in touch with owner about it. Ms Matheson could not recall this conversation. Ms Diefenbach recalled at least five phone conversations with Ms Matheson about the front verandah during the tenancy. Ms Matheson steadfastly maintained she had only two conversations with Ms Diefenbach about the front verandah and these occurred in May 2010.
105. In giving her evidence about these alleged interactions with Ms Diefenbach, Ms Matheson relied on her usual practice to have entered a note of these conversations in Console Gateway, the implication being if there is no record in Console Gateway, then the interaction must not have occurred.
106. It is clear that agency file produced to the court should not be relied on as a complete and definitive record of all interactions between ORRE personnel and Ms Diefenbach or others. The evidence given by each of the property

managers shows they did not consistently document everything they did in relation to the property on Console Gateway, so it is not appropriate to suggest that if something is not documented in the agency file, it did not occur. The manner in which the file was produced to the Police and later to the Court indicates that it was in disarray, not easy to access and parts of the documents forming the file were still being located late in the Inquest proceedings.

107. The evidence is clear that Ms Diefenbach and Ms Matheson had regular dealings throughout the tenancy about a range of ongoing and emerging maintenance and repair issues. Ms Diefenbach was also having contact in this regard with Jana Hawkes. It has been submitted that Ms Diefenbach must be mistaken as to the number of conversations she had with Ms Matheson about the front verandah. The evidence as a whole on this issue is not certain enough for there to be a definitive conclusion drawn as to the extent and exact nature of the contact between them on the problem with the front verandah.

**First routine inspection on 1 February 2010:**

108. The Diefenbachs had their first routine inspection while the bathroom repair issue was being dealt with. The agency file shows ORRE's routine inspection notices included forms that enabled tenants to identify maintenance issues and request repairs. This documentation was sent to the Diefenbachs under cover of a letter dated 25 January 2010.
109. The property was inspected by property manager, Chantal Stevens, on 1 February 2010. Ms Stevens was a young woman who had been a property manager with ORRE since late 2009. There is no dispute that Ms Stevens did not prepare for the routine inspection by referring to any part of the agency file or speaking with the other property managers. Ms Diefenbach completed a repair request form and gave it to Ms Stevens during the inspection which documented a range of maintenance issues including "*some steps on stairs some wood on front deck rotten*" (referring to the hole in the verandah). Ms Diefenbach marked these issues as "*not urgent*". Ms Diefenbach acknowledged that at this time she did not consider that any of the issues she noted on the form posed an imminent risk of harm.
110. It is fair to say that Ms Stevens' recollection of the inspection and action she took afterwards was generally vague and unhelpful. In her oral evidence, Ms Stevens relied on what her usual practice would have been at that time, rather than actual recollection.
111. Ms Diefenbach recalls Ms Stevens was extremely rude to her and made a statement to the effect that "*you saw the way the house was when you moved in. You're just going to have to put up with it*". Ms Diefenbach denies that Ms Stevens compared the volume of maintenance issues for the older Spring Street property to those of the brand new spec home the Diefenbachs had come from and queried whether the Diefenbachs were happy to continue living in the property. Ms Stevens denies that she was rude to Ms Diefenbach

during the inspection. At best, she had a vague recollection of her conversation with Ms Diefenbach but given her subsequent advice to the owner by email on 4 February 2010, conceded it was possible the conversation did canvas the suggestion that Ms Diefenbach adjust her expectations about living in an old house with lots of maintenance issues.

112. It is clear that Ms Diefenbach did highlight these areas of concern to Ms Stevens during the inspection. This is supported by Ms Stevens' email advice to Mr Lagos on 4 February 2010 which opens with the statement "*here are the things the tenant pointed out to me when I did the routine inspection as requested*" and then indicates she specifically inspected the front steps and the front verandah that day.
113. Ms Stevens' subsequent email to Mr Lagos on 4 February 2010 contains advice that "*I found the deck and steps not to be dangerous and it was even raining at when I went through.*" It seems from the evidence that Ms Stevens' inspection of these areas was superficial and cursory, at best, as she was at the property for only about 10 minutes in total. Ms Stevens could not recall seeing the hole depicted in exhibit B3.2.1, photograph 12 and did not note this in her inspection report. She had received little if any training about how to inspect decks, verandahs, railings or steps. Ms Stevens was clearly not qualified to make the safety assessment she communicated in that email.
114. Ms Stevens stated that she phoned Mr Lagos on 3 February 2010 about the outcomes of the routine inspection. She recalls speaking to him for 4-5 minutes during which she told him about the issues noted in the repair request and Mr Lagos asked her to email those issues to him as he had a carpenter friend who could possibly attend to them for him. Ms Stevens acknowledged that she did not inform Mr Lagos of the issues that she crossed off on the repair request because these issues were being dealt with by other property managers. Mr Lagos has no recollection of the phone call with Ms Stevens but did not dispute that the phone call occurred or that he may have told her to email the issues to him.
115. Ms Stevens also prepared a routine inspection report. It itemised five of the issues listed in the repair request form including "*some wood on the front deck and steps is rotten*" and noted she had emailed "all this" to Mr Lagos. The inspection checklist assessed the verandah/balcony as "*satisfactory on visual inspection*" and "*good*". Ms Stevens says she made this assessment, despite Ms Diefenbach's identification of rotten wood on the front verandah, because she considered they were satisfactory at the time meaning "*they weren't falling down or anything*". Ms Stevens could not recall whether she prepared the inspection report before or after she emailed Mr Lagos on 4 February 2010. It is not clear whether this report was provided to Mr Lagos.
116. Mr Lagos confirmed he received Ms Stevens' email. He can not recall when he accessed it, but acknowledged he did so prior to 20 February 2010 as he engaged Fitzy's Fencing to replace the front fence by this time in direct response to this issue being raised in Ms Stevens' email. Ms Stevens' evidence was that after sending the email, she was waiting for further

instructions from Mr Lagos about only the pest control and the gutters and states that he did not give her any instructions to take further steps in relation to those issues.

117. Mr Lagos says he accepted Ms Stevens' advice that she had found the front verandah and steps not to be dangerous. He was entirely reliant on this advice as an indication that he did not need to take any immediate action about this issue and consequently, he didn't give the front verandah issue any further thought or action. Mr Lagos did not recall giving Ms Stevens any indication he would get back to her with further instructions about any of the issues raised.
118. The agency file contains an email from Ms Stevens to Hannah Matheson on 5 February 2010 suggesting that she spoke with Ms Diefenbach that day. Ms Stevens' could not recall whether she told Ms Diefenbach she had spoken with Mr Lagos about the routine inspection. The agency file shows that Hannah Matheson followed up Ms Stevens' progress with the pest control issue on 16 February 2010, at which time Ms Stevens placed a pest control work order. Ms Stevens could not explain why she had not previously actioned this issue. The agency file shows the pest spray was done on 22 February 2010.
119. The first routine inspection validated Ms Diefenbach's identification of the presence of wood rot in the front verandah and represented the first time this issue was actively reported to Mr Lagos. Unfortunately, Ms Stevens' cursory examination of the affected areas resulted in her conveying an inexperienced opinion that front verandah and steps were not dangerous. It is entirely reasonable for Mr Lagos to have relied on this advice, from the property manager acting as his "*eyes and ears*" to determine that the matter did not warrant further inspection or action at that time.

**First contract of sale and outcomes of pre-purchase building and pest inspections:**

120. A contract of sale on the property was signed on 3 March 2010. The purchaser was Sharon Sheales. Ms Sheales taught at the same school as Mr Diefenbach and had known him in this capacity for the preceding five years, however she did not socialise with the Diefenbachs.
121. Ms Sheales saw the 12 Spring Street property advertised and made an appointment to inspect it accompanied by Katie O'Reilly in February or March. Ms Sheales says it was during this initial inspection that she first realised the Diefenbachs were living at the property. She recalls the Diefenbachs were home that day and they spoke. She does not recall the Diefenbachs mentioning any particular concerns about the property on that occasion. It was a quick inspection.
122. On 28 February 2010, Ms Sheales signed a contract for the property. The contract was subject to finance approval and satisfactory building and pest

inspections. Mr Lagos signed the contract on 3 March 2010. The same firm of solicitors was representing both parties in the transaction.

### ***Pre-purchase inspection by Casey Van Hese on 8 March 2010***

123. Ms Sheales engaged CQ Building and Pest Inspections Pty Ltd to inspect the property. Mr Casey Van Hese, an experience licensed building inspector and pest technician, inspected the property on 8 March 2010. Pre-purchase inspections must be done in accordance with an Australian Standard which requires the inspection of all external components of the building, including patios, decks, verandahs etc but other than requiring commentary on weathering and painting of external surfaces, with a specific process to be followed when inspecting the components of a deck. Under cross-examination by Counsel for the Family, Mr Van Hese explained the Standard prevents inspectors from poking, prodding, gouging, digging into (i.e. damaging) or hammering any timbers. Mr Van Hese explained that a standard inspection takes about half an hour to an hour-and-a-half, depending on the condition of the property.
124. The inspection report shows that Ms Sheales asked Mr Van Hese to examine specifically the extent of termite activity/damage, water damage and whether there was insulation. Mr Van Hese had access to the inspections reports that had been prepared in respect of the property in 2006.
125. The pest inspection report that Mr Van Hese prepared noted:
  - i. active termites and evidence of termite activity with the extent of termite damage as “moderate”. It rated the risk of termite infestation to the overall property as “high”, with the notation “*currently active*”. It noted no evidence of previous termite treatment or barrier system and noted the ant caps were obstructed. It recommended immediate removal of the obstruction or installation of a chemical barrier;
  - ii. moderate to extensive fungal decay to patio decking and stairs. It rated the drainage to be generally “*inadequate*”.
126. The pest inspection report made essentially the same recommendations as those made in the CQ Building & Pest Inspections report in August 2006 and the Active Pest Control report in November 2009.
127. The building report rated the property to be slightly less than “*average*” condition overall. It identified three items that could constitute a *present* or imminent safety hazard and seven major defects, none of which related to the front verandah. The front verandah assessment rated the decking timbers as “*minor defect – material deterioration – wood rot to a few and Loose fixings to a few*”. Its only recommendation about this structure related to the posts contacting the ground.
128. Mr Van Hese could not recall seeing the hole depicted in the exhibit B3.2.1 photograph 12 during his inspection of the front verandah. He could not recall with any precision the location of the few boards he noted to have wood rot,

other than to say there was “a little bit” of wood rot around the top of the stairs and near the railings in that vicinity. He quantified his reference to “a few boards” to mean anywhere from 3-8 boards. He considered the location of the unpainted boards depicted in exhibit F1, photograph 38 (taken on 29 May 2010) was consistent with the location of the wood rot he identified at the inspection, explaining that the boards go back as far as they do in that photograph because it is standard practice when replacing a board to take it back to the next join, rather than excising the affected piece.

129. Under cross-examination by Counsel for the Family, Mr Van Hese clarified the location of the weathered and rotten boards as “*between the front door and the top of the stairs*”. He says he noticed the wood rot “*mostly from the top*”. He confirmed he went underneath the deck, and although he did not specially recall thinking he needed to check the area underneath the boards where he noticed the wood rot, he says he would have particular attention this area. He didn’t consider that he would have used a screwdriver to assess the extent of the wood rot because he’d already identified it from above.
130. Mr Van Hese further explained there was no need for him to note the hole specifically in his report as it would have been covered by his general notation of wood rot. He says would probably make more mention of a hole in the decking if it was in the middle of a high traffic area. Under cross-examination by Counsel for ORRE, Mr Van Hese said he would have taken a photo if he considered the wood rot was bad or he saw big holes or a dangerous situation. He did not in any way consider the entire front verandah needed replacing and he agreed with the proposition that the majority of the boards were sound.

### ***Inspection by Ms Sheales’ builder, Robert Lilliboe***

131. Ms Sheales, having read the inspection reports, was concerned about the finding of active termites and the extent of termite damage and the finding of moderate to extensive wood decay in the patio decking and stairs. She gave copies of the reports to the solicitor.
132. The agency file contains copies of correspondence from the solicitor to Mr Lagos about the outcomes of the building and pest inspections. It shows copies of both reports were emailed to him under covered of correspondence dated 15 March 2010. He was advised the inspections were unsatisfactory and Ms Sheales was making enquiries about what it would cost to rectify the identified defects.
133. Mr Lagos says his solicitor was communicating with him by mail and email. He acknowledged that even once there was a contract on the property, he was not checking his email more frequently. Mr Lagos says the pre-purchase inspection reports were emailed to him by the solicitor in a format that was not complete. He says he did not make any effort to obtain a readable version of the reports at that time, even though he had been advised there were numerous defects with the property.

134. Ms Sheales organised for Robert Lilliboe, an experienced licensed builder, to inspect the property on the advice of the solicitor with a view to getting a builder's quote to use in negotiations about the sale price. Ms Sheales and Mr O'Reilly were present when Mr Lilliboe inspected the property sometime between 8 & 16 March 2010. Ms Diefenbach was at home on that occasion.
135. Ms Sheales engaged Mr Lilleboe to do a visual inspection of the property, with a focus on checking the extent of termite damage. Ms Sheales recalls mentioning to him her concerns about the front and rear decks and stairs. She explained that a previous experience with having to remove a roof and undergo termite treatment and install termite barriers meant that the "wood work" was her focus, more so than the apparent bathroom leak. Mr Lilliboe says that Ms Sheales did not give him copies of Mr Van Hese's inspection reports.
136. Mr Lilliboe recalls inspecting the front verandah for about 5-10 minutes. Between 4-6 mouldy boards that felt "*just a little bit softer than the rest*". He could not recall the location of these boards. He didn't see any decay from underneath these boards. He considered these boards needed to be replaced within the next six months. He did not feel unsafe on the front verandah and did not consider there was any imminent danger or safety hazard at that time. He stated that he noted some decking boards were weathered and "*spongy*" in that they seemed "*questionable under weight*". He considered these boards needed to be replaced and quoted \$250 for this rectification. He considered the remaining decking to be sound.
137. Mr Lilliboe did not answer questioning about whether he recalled seeing the hole depicted in exhibit B3.2.1, photograph 12. Ms Sheales does recall seeing it at some stage before she terminated the first contract on 22 March 2010. Mr Lilliboe recalled mentioning the need to replace some of the boards to Ms Sheales while they were on site that day.
138. Ms Diefenbach's evidence is that at some stage Mr Diefenbach told her Ms Sheales had told him there were a few things that needed to be fixed before the contract could go through, including specifically that the front verandah needed to be replaced. Ms Diefenbach assumed this to mean entirely replaced. Ms Sheales recalls, at best, she may have briefly mentioned her concerns to the Diefenbachs after the pre-purchase inspections and is not sure she would ever have said that the front verandah needed to be replaced altogether, as she did not consider herself qualified to say something like that.
139. Mr O'Reilly had a limited recollection of what occurred during this inspection, as he maintained he was present only to facilitate the inspection and negotiate the sale. He was not qualified to assess the defects identified in the pre-purchase inspection reports and paid little attention to what Mr Lilliboe was doing. Mr O'Reilly recalls walking around on the front verandah but not paying a lot of attention to its condition, other than recalling it "*felt solid*".
140. Ms Diefenbach's application for an inquest states that she spoke to Ms Sheales during the inspection and told her the house was in poor condition

and it was dangerous, especially the front verandah. There is no dispute that a conversation occurred between the two women on this occasion. Ms Sheales could not recall the conversation precisely but was left with the impression that the house needed quite a bit of repair and that the Diefenbachs felt frustrated that their repair requests weren't being actioned. Ms Diefenbach recalls showing Ms Sheales the white ants in the laundry underneath the house. She cannot recall whether she showed Ms Sheales anything else and cannot recall speaking to her about the front verandah.

### ***Contract negotiations from 17 March 2010***

141. On 17 March 2010, Ms Sheales sought to reduce the purchase by \$3877 to offset the cost of the rectification work. Mr Lagos recalls receiving this letter by email but says he did not ask for copies in the pre-purchase inspection reports and does not recall if he asked to see the quotes either. He cannot recall specific conversations with ORRE at this time. Steven Clarke's evidence was that Mr Lagos showed him a copy of the quote to fix various items Mr Lagos was to attend to and he considered the quote was excessive.
142. Mr O'Reilly spoke to Mr Lagos about the counter offer. This was this first time he had spoken with Mr Lagos. He recalls Mr Lagos was difficult to contact during this time. He recalls they spoke about the proposed price reduction and Mr Lagos advised him he thought the quotes were too expensive and he had a builder friend who could do the work for less. Ms Sheales subsequently terminated the contract on 22 March 2010.
143. Mr Lagos states that he was not aware there were problems with the front verandah needing rectification until after he was told that Ms Sheales had terminated the contract. It is clear from the evidence, however, that Mr Lagos was clearly aware before the contact was terminated that there was some rectification work required to be done to the front verandah.

### **Events following termination of the first contract of sale:**

#### ***Ongoing maintenance issues***

144. The agency file shows Ms Diefenbach contacted Hannah Matheson on 22 March 2010 to follow up her outstanding complaints about removal of fallen branches and mice (notified on 1 & 16 February, respectively). Ms Matheson contacted Mr Lagos that day and advised Ms Diefenbach by SMS she was waiting to hear back from him. Ms Diefenbach is noted to have followed this up again on 14 April 2011. Hannah Matheson advised Ms Diefenbach by SMS she had left two messages for the owner and would continue her efforts to contact him.

#### ***Mr Lagos's inspection of the property on 25 March 2010***

145. On 25 March 2010, Mr Lagos attended the property with his friend, Steven Clarke, and Mr O'Reilly to inspect the defects Ms Sheales had deemed

unsatisfactory. Ms Diefenbach was at home at the time but stayed inside the house while they were there.

146. Mr Clarke and Mr Lagos were friends and shared a house after Mr Lagos moved out of the property in 2007 up to the time of the Inquest. Mr Clarke was a trade qualified carpenter with about six years' experience in the industry. He was not licensed because he had always worked for an employer, not as a subcontractor. Mr Lagos was aware that Mr Clarke was not licensed.
147. Mr Clarke gave a statement to police signed on 30 May 2010 and a statement to Mr Lagos's solicitor dated 24 January 2011. The second statement was not disclosed in these proceedings until requested by Counsel Assisting shortly before the oral evidence commenced on 17 October 2010. Mr Clarke also gave evidence at the inquest. There are discrepancies in the evidence he has given at these various stages.
148. Mr Clarke had never been to the property before 25 March 2010 and was not involved in any discussions about maintenance at the property. Fitzy's Fencing installed a new fence at the property on 20 February 2010 which was wrongly attributed to Mr Clarke by other witnesses.
149. Mr Clarke recalls Mr Lagos first spoke to him about going to the property shortly before 25 March 2010 to have a look at some things that had come up in the building report. He saw a builder's quote and thought it was very high. He did not see the pre-purchase inspection reports. Mr Clarke says Mr Lagos did not mention anything relating to the front verandah at this time. Mr Lagos told the court he felt that Mr Clarke definitely understood his role at 25 March inspection was to assess what needed to be done and to carry out the work required to pass the pre-purchase inspection reports to help facilitate the sale of the house. There is no dispute that Mr Clarke clearly understood this to be his role in relation to the property. Mr Clarke's involvement was not connected with the tenant complaints.
150. It is agreed that Mr O'Reilly referred to a document as he took them around the property. Mr O'Reilly says he was referring to copies of the pre-purchase inspection reports. He was surprised that Mr Lagos had not brought copies of them to the inspection. Mr Clarke described being shown a list but was not given a copy. Under cross-examination by counsel for ORRE, Mr Clarke did not dispute that the list was in the pre-purchase inspection reports.
151. Mr Clarke took some notes of the materials required to fix the areas of concern. There is no dispute that generally they discussed the need to replace some step treads on the front stairs and some visibly weathered boards on the front verandah and repairs to the bathroom, the sunlight, a downstairs window, and a problem with the handrail on the rear verandah. Mr Clarke recalls that they inspected the front verandah first.
152. Mr Clarke stated that there were some boards that looked weathered and like they had some dampness in them. They were underneath the front verandah

at some stage but not specifically to inspect the timber decking. Mr Clarke measured up the boards that needed to be replaced and the inspection was completed in 10 minutes. Mr Lagos had a very limited recollection of the inspection.

153. None of the men actively applied weight to sections of the verandah during the inspection. The evidence about the extent and location of the work identified as needing to be done to the front verandah is somewhat unclear. Mr Clarke's statement to police did not quantify the "*visibly weathered*" boards that needed to be replaced. His statement described most of these boards as being located on the right hand side of the verandah as you walk up the stairs and another one was located on the far left hand side towards the middle section of the verandah. He considered the remaining decking boards, although aged, were sound. Mr Clarke's statement to Mr Lagos's solicitor appended a diagram of the front verandah (parts of which he drew) showing the location of the boards he replaced when he subsequently attended the property. Mr Clarke did not recall seeing the hole depicted in exhibit B3.2.1, photograph 12 and exhibit F5, but says he probably would have seen it on the day. The superficial inspection of the front verandah on 25 March 2010 did not identify any imminent safety risk.
154. Mr Clarke subsequently replaced four boards in the locations that he identified at the 25 March inspection that needed to be replaced. Mr Clarke says he then measured up and estimated that he needed 16 lineal metres of merbau decking to replace those boards. Mr Lagos told the court he and Mr Clarke did not discuss the extent of work required to the front verandah that day but he considered Mr Clarke knew what he needed to do and that when they left the property that day everyone had a shared understanding "*to an extent*" about what needed to be done.
155. Mr O'Reilly stated that Mr Lagos told him Mr Clarke would rectify the problems identified in the inspection reports if Ms Sheales entered into a new contract for the original contract price. Mr Lagos did not recall this discussion.
156. Mr Clarke understood that the repairs were to be done in a timely manner and he was to carry out the work at cost as a 'gentleman's agreement' between them. Mr Lagos and Mr Clarke both deny any discussion between them about the work being done as cheaply as possible. However, it is noted that this evidence should be considered in the context of Mr Lagos' unwillingness to accept a purchase price that was reduced by \$3877.

**Isabella was born:**

157. Isabella was born on Tuesday 6 April 2010. The Diefenbachs brought her home on Friday 9 April 2010. Isabella suffered from reflux and could be difficult to settle after a breastfeed but was otherwise well.

## Work was done on the front verandah

158. Mr Clarke attended the property on two separate occasions to do work on the front verandah. However the evidence is not entirely clear about when those attendances occurred. Mr Clarke recalls ordering hardwood decking from the local hardware several days after the inspection on 25 March. He was told there would be a week or so delay while some of the materials he required were ordered in. He arranged to collect everything at the same time.
159. Mr Clarke told Police that he collected the materials from the hardware "*towards the end of April*" and attended the property. At the inquest, Mr Clarke was shown invoices provided by Mitre 10 Yeppoon for transactions made on his account in the months of March, April and May 2010. Mr Clarke identified invoice 00226723 dated 27 April 2010 as the invoice which contained items he ordered for the rectification work to be done on the property, including a quantity of 19.6 lineal metres of merbau timber (about five pieces of decking).
160. Mr Clarke says he probably collected the material early on the morning of 27 April 2010 and went straight to the property, where he worked for 4-5 hours without leaving the property during that time and was still there at 1:00 – 1:30pm that afternoon. He says he replaced some boards on the front verandah and stair landing, replaced some treads on the front stairs and installed a mid-rail on the rear stair handrail during this visit.
161. Mr Clarke's reliance on the 27 April invoice as evidence of his attendance at the property that day is problematic only if it is accepted that the incident involving Lyn Diefenbach occurred between 1:00pm – 1:30pm that afternoon. This is because the invoice was issued at 10:25am. If Mr Clarke did attend the property immediately after collecting the materials that day, then on his evidence, he would still have been present when the incident occurred. However, he could not recall this incident occurring during his first work attendance at the property. Further, he recalls being advised about the board that was damaged during this incident after his first work attendance.
162. Ms Diefenbach is certain that Mr Clarke's first work attendance occurred after Isabella was born but before the incident involving Lyn Diefenbach on 27 April. This is supported by Mrs Diefenbach's recollection that the hole in the front verandah had been fixed when the incident occurred. Neither of the Diefenbach women recall anyone being at the property before they left to go to the hospital on the 27<sup>th</sup> which was the day Mr Clarke nominated as the day he commenced the repairs.
163. Ms Diefenbach was home during Mr Clarke's first work attendance. He brought about five pieces of timber with him that day and explained to Ms Diefenbach that he was replacing some wood on the front verandah. Ms Diefenbach says she pointed out specific areas of concern to him but Mr Clarke denies this occurred. Mr Clarke explained that he jemmied up the boards he replaced with a pry bar, took them out, measured up and cut in the replacement timber. He says he checked the adjacent boards for

deterioration (mould and swelling). He did not apply any wet rot treatment or stain the new boards. He confirmed he was aware that board affected by wood rot can appear normal on visual inspection.

164. Ms Diefenbach says Mr Clarke only replaced one verandah board with a new board. This board was located at the middle of the eastern side of the verandah. She says Mr Clarke also replaced the board that had a hole in it and that he replaced it with an off-cut from the other board that he had replaced with new timbers. Mr Clarke initially relied on a diagram he prepared for Mr Lagos's legal representatives to show the location and number of boards he replaced during this visit. He initially claimed that all of the boards were replaced with new timber and denied that he would ever use old timber to replace a damaged board. However, once shown exhibit F1, photograph 38 (which shows the board with the hole was not replaced with a new board), Mr Clarke accepted Ms Diefenbach's evidence about him using old timber was correct. He continued to assert that he replaced two boards near the front door during this visit.
165. Mr Clarke told Police that on this occasion he did a more thorough investigation of the front verandah during his first work attendance. He acknowledged that Mr Lagos left it entirely up to him as to what investigation he made. He told the court he had a better look at the front verandah by checking it over from on top and underneath; having a good walk around on it; applying his weight by bouncing or springing on boards; and checking the stability of the verandah handrail. Mr Clarke did not probe the boards with a screwdriver or tap them with a hammer to check for wood rot.
166. Mr Clarke acknowledged that the verandah was quite weathered with a "*bit of mould and stuff*" but says he was satisfied the remaining boards were sound and he did not feel unsafe on the verandah that day. Mr Clarke spoke to Ms Diefenbach before he left that day. Ms Diefenbach recalls he told her he needed to order more timber for the stairs and some other items, but nothing further for the front verandah. Mr Clarke clarified he needed to order materials for the bathroom repair.
167. Mr Clarke considered that he had completed all of the work required on the front verandah that day. He recalls telling Mr Lagos that he had completed the work but could not recall when he told Mr Lagos this. Mr Lagos could not recall this conversation but conceded it was possible it occurred. Mr Lagos's evidence suggests that he was aware before he left for Fiji on 3 May that Mr Clarke had done some work on the verandah and if it was not completed by then, it would be done shortly.
168. Mr Clarke took the old boards home with him and left the remaining new boards under the house. Police seized the old timber boards from Mr Clarke after Isabella's death.

## Incident involving Lyn Diefenbach

169. Ms Diefenbach and her mother-in-law, Lyn Diefenbach, gave evidence of an incident in which a board on the front verandah cracked underneath Lyn Diefenbach's weight as she exited the front door, while carrying Isabella in a baby capsule. The board that cracked was the fifth board out from the front door. Mrs Diefenbach's foot did not go all the way through the board and she was not injured in the incident.
170. There is a dispute about when this incident occurred when Ms Diefenbach first reported this incident to ORRE – 27 April or 4 May. Both Ms and Mrs Diefenbach are definite in their recollection that the incident occurred shortly after 1:00pm on 27 April 2010 and that Ms Diefenbach reported the incident to ORRE in person that same afternoon. Mrs Diefenbach drove Ms Diefenbach to the Rockhampton Hospital for an appointment at 2:00pm that afternoon and then drove her to ORRE on the way home from the hospital, so she could report the incident in person. Mrs Diefenbach remained in the car with her son Kyle and Isabella while Ms Diefenbach was in the ORRE office.
171. Ms Diefenbach says she told Jana Hawkes about the incident and Jana took a message. Ms Diefenbach says she raised the incident again with Jana Hawkes when she attended the office on 4 May 2010 to pay her rent. She recalls mentioning that she had come into the office the week before but hadn't heard anything from ORRE. She also recalls making a humorous statement on this occasion to the effect that "*some people might like their mother-in-law to fall through the board but I actually like my mother-in-law*". She saw Ms Hawkes typing on the computer at this time.
172. The first reference to this incident on the agency file is an email sent by Jana Hawkes to Ms Matheson at 3:55pm on 4 May 2010 advising that Ms Diefenbach reported this incident. The email notes Ms Diefenbach told Ms Hawkes she had been "*complaining (sic) about it for a while now for something to be done about it. All the railings are old and rotten.*" Ms Hawkes stated this was the only occasion on which Ms Diefenbach spoke to her about the front verandah.
173. Ms Hawkes could not recall her discussion with Ms Diefenbach about the incident. She denied the possibility that Ms Diefenbach had reported it on 27 April and Ms Hawkes did not pass on a message to Hannah Matheson about it on that occasion. In comment on the timeframe of the complaint, Ms Hawkes relied on her normal practice to email any maintenance issues straight through to Ms Matheson. Ms Hawkes could not recall whether the reference to "*complaining about it for a while now*" in her email of 4 May was a reference to the incident itself or to the front verandah.
174. It is not disputed that the incident occurred after Mr Clarke's first work attendance. Mr Clarke is relying on the timber receipts to establish the timing of his first attendance at the property being 27 April at the earliest. However, that evidence is tentative at best, taking into account Mr Clarke's lack of recall

of any specifics relating to the whole matter, and his over-reliance on receipts for materials to determine the timing.

175. I am satisfied that both Ms Diefenbach and Mrs Diefenbach would have remembered the incident being on a day when they were taking Isabella to an appointment at the hospital. It is also reasonable that Lyn Diefenbach would have a strong recollection of the day she first met her first grandchild, as she had been overseas for several weeks when Isabella was born and saw her the day after she returned from New Zealand. She was understandably very excited about this occasion. I prefer the evidence of the two women on the timing of the incident.
176. I am further satisfied that Ms Diefenbach reported the incident to Ms Hawkes on 27 April but that the report was not recorded at the agency until 4 May when the second discussion was had.

***Action taken by ORRE and Mr Lagos in response to notification of incident***

177. Ms Hawkes says she emailed Ms Matheson immediately after she had spoken to Ms Diefenbach on 4 May. She tried unsuccessfully to contact Mr Lagos about the incident that day and continued her attempts over the next few days. There is no dispute that Hannah Matheson subsequently spoke with Ms Diefenbach on 7 May 2010 about the incident and advised that she would contact the owner about it. The file note of this conversation suggests it was instigated by Ms Diefenbach.
178. Mr Lagos was holidaying in Fiji at this time. Ms Matheson told him about the incident and he advised her that his friend was waiting for materials on order to repair the front verandah (recorded in a note on Console Gateway on 7 May). Ms Matheson was not aware that work was being done on the property in response to the pre-purchase inspection reports and she did not recall Mr Lagos mentioning whether his friend had already done some work at the property or indicating a timeframe in which the damaged board would be fixed. Mr Lagos did not instruct her to do anything further in relation to the front verandah. Mr Lagos remembers receiving a call from ORRE while he was in Fiji but has no specific recollection of the conversation with Ms Matheson. He does not dispute that he was informed of the incident on this occasion.
179. Mr Lagos subsequently instructed Mr Clarke to return to the property to repair the damaged board. He could not recall whether he contacted Mr Clarke from Fiji or whether he discussed this with him on his return after 13 May, though it was probable that he did arrange this from Fiji. Mr Clarke could not recall when Mr Lagos contacted him about the damaged board, but says he attended the property within several days of Mr Lagos speaking to him about it. Ms Diefenbach's recollection that Mr Clarke attended the property several days after Hannah spoke to her on 7 May.
180. Ms Matheson acknowledged (and the file confirms) that she did not take any action at any time to follow up whether temporary measures were required to

make the verandah safe for the tenants. It is noted that Ms Diefenbach's notification to ORRE of this incident did not indicate any personal injury or urgency or loss of amenity at that time. Ms Diefenbach's evidence was that they didn't use the front verandah for about a week until it was repaired. However this is contradicted to an extent by Mrs Diefenbach's evidence that they used the front verandah to enter the house after their outing on the day the incident occurred.

181. Ms Matheson was given a clear indication that Mr Lagos was making his own arrangements to have the damaged board repaired. Not being aware of Ms Diefenbach's prior identification of the presence of wood rot in the front verandah in the entry condition report and the first routine inspection, Ms Matheson had no basis on which to question the general safety of the front verandah on this occasion.

#### **Mr Clarke returns to carry out more work on the front verandah:**

182. Ms Diefenbach says Mr Clarke replaced three boards that day, being the third, fourth and fifth boards in front of the door. Mr Clarke relied on the diagram he prepared for Mr Lagos's legal representative, which identified only one board adjacent to the house. When shown exhibit F1, photograph 38, Mr Clarke maintained the board he replaced was the new board closest to the front door.
183. Ms Diefenbach's evidence as to the extent of work done by Mr Clarke that day is supported by Lyn Diefenbach's evidence that suggests she did not see any new, unfinished boards near the board that was damaged in the incident reported to ORRE.
184. Mr Clarke says he was surprised the board had cracked because he claims he had previously checked it when replacing the adjacent boards on his first work attendance. Mr Clarke recalls he may have had another look at the front verandah from the top and underneath during this visit. He admits he did not probe the boards with a screwdriver or tap them with a hammer. He was not concerned so much as "baffled" as to why the board he came to replace had cracked.
185. Ms Diefenbach recalls asking Mr Clarke before he left whether the deck was safe to use. She says he told her it was and then volunteered that he had told the owner that the whole front verandah needed to be replaced and the owner had indicated he would think about it. Mr Clarke could not recall Ms Diefenbach asking about the safety of the front verandah and denied telling her it needed to be replaced. Notwithstanding this, Mr Clarke acknowledged that at the time he did consider the front verandah needed to be replaced within the next 1-2 years because it was getting old and thought he had mentioned this to Mr Lagos sometime after his first work attendance. Mr Lagos could not recall this conversation but conceded it was possible that Mr Clarke did convey his opinion about this issue.

186. Mr Clarke says he did not return to complete the outstanding repairs due to Isabella's death in the interim. He thinks he told Mr Lagos after his second work attendance that he had completed all the work on the verandah and although he could not recall when this conversation occurred, suggested it was possibly after Mr Lagos returned from Fiji and before he left for Middlemount on 16 May 2010. Mr Lagos' evidence suggests he probably did see Mr Clarke during this period.

### **Second routine inspection**

187. There was a second routine inspection of the property during the Diefenbach tenancy. This was conducted by Briny Hawkes. It is not disputed that Ms Hawkes did not speak with Hannah Matheson about current maintenance or repair issues for the property prior to attending the inspection and she had no prior knowledge of the incident involving Lyn Diefenbach or that the owner was arranging for the damaged board to be repaired.
188. Ms Diefenbach was present for the inspection. Ms Hawkes did a general walk through of the property and Ms Diefenbach did not show Ms Hawkes any areas of concern on the front verandah. Ms Hawkes sent a copy of her routine inspection report to Mr Lagos that day. Ms Diefenbach was not provided with a copy of the routine inspection report. Ms Hawkes did not speak to Hannah Matheson about the outcomes of the routine inspection.
189. There is a dispute as to when the inspection occurred – Ms Diefenbach maintains it occurred on 16 April 2010 and Ms Hawkes maintains it was done on 12 May 2010. The weight of the evidence supports a finding that Ms Hawkes inspected the property on 12 May 2010 due to the timing of the quarterly inspections, and Ms Hawkes' work calendar and diary notes.
190. Ms Hawkes explained that there is no hard copy of the entry notice for this inspection because it was not usual practice to keep a hard copy on the property management file. She could not explain why a copy was not printed off Console Gateway on the evening of 29 May 2010 during execution of the police warrant, but advised that a subsequent software update has resulted in the entry notices no longer being visible on the system.
191. There is a dispute about whether Ms Diefenbach gave Ms Hawkes a repair request form during that inspection.
192. Ms Diefenbach says she completed the repair request form for this inspection. She produced a copy of that form which notes a number of "urgent" repair and maintenance items including "*Front verandah rotten. Very dangerous as it is the only way to front door. Not all of verandah has been repaired.*" It included the notation "*Have phoned numerous times!*" It is dated 18 April 2010. Ms Diefenbach confirmed that 18 April was the date she completed the repair request and thought it was after Mr Clarke's first work attendance but before the incident involving Lyn Diefenbach. Her evidence about the timing of Mr Clarke's first work attendance vis-à-vis her completing the repair request is somewhat confused.

193. Ms Diefenbach agreed with the proposition that she marked the repairs as urgent more out of frustration than any concern that the front verandah posed an imminent safety risk. She explained that the reference to the front verandah was a reference to “*just a few bits and pieces*” that did not look right to her, though she acknowledged she didn’t really know whether they were completely rotten.
194. Ms Hawkes’ has a markedly different recollection of what occurred during the inspection. She maintains the only maintenance issue that Ms Diefenbach raised with her related to the removal of palm fronds.
195. Ms Hawkes says she did a general inspection of the front verandah. She did not notice anything of concern and did not recall seeing the hole depicted in exhibit B3.2.1, photograph 12. When shown a copy of exhibit F1, photograph 38, Ms Hawkes could not recall whether she noticed any new boards. Ms Hawkes returned to the office and completed an inspection report and checklist from scratch noting no reported or visible maintenance issues. She assessed the verandah/balcony as “*satisfactory on visual inspection*” and “*good*”.
196. Ms Diefenbach’s evidence is that although she initially told Ms Hawkes she had not filled out the maintenance and repair forms, she then remembered she had. She retrieved the checklist and the repair request and gave the documents to Ms Hawkes, who put them down on a table near the front door. Ms Hawkes then inspected the inside of the house and left the property without taking the repair request. The date of the report (18 April) would tend to further support the timing of the inspection on 12 May rather than 16 April. However, Ms Diefenbach stated that after the inspection she scanned and emailed a copy of the checklist and the repair request to Hannah Matheson. Her evidence is that because she dated the repair request 18 April this is when she would have emailed it to Hannah. Ms Diefenbach was unable to produce a copy of the email due to problems with her Hotmail email account.
197. Ms Hawkes sent a copy of the inspection report to Mr Lagos at his mother’s home address under a covering letter that noted no maintenance had been reported by the tenants or visually noted during the inspection.
198. The agency file does not contain a copy of the repair request form or the email Ms Diefenbach says she sent to Ms Matheson. Ms Matheson denies receiving the email and maintenance and repair forms from Ms Diefenbach. ORRE engaged a computer consultant to interrogate the email accounts of each of the property managers. These efforts did not locate a copy of the email Ms Diefenbach claims to have sent to Ms Matheson attaching the documents in question, though it is acknowledged that this search process would not locate or retrieve any emails which may have been deleted from the deleted items box of an email account, as once an email is deleted from this box, it can only be retrieved for a period of 30 days.

199. The evidence on this point is such that Ms Diefenbach's assertions relating to the repair request cannot be fully contested.
200. Ms Hawkes' conduct in relation to this inspection, namely her failure to inform herself of previous inspection outcomes and current maintenance and repair issues, demonstrates serious inadequacies in the then current property management practices which operated to deprive the property managers of a holistic appreciation of the status of a given property's maintenance and repairs issues.

**Second contract of sale:**

201. Ms Sheales recalls that Mr O'Reilly phoned her not long after the first contract was terminated and advised her that Mr Lagos would fix certain things if she agreed to pay the original contract price. She did not recall any discussion with Mr O'Reilly about how extensive the repairs to the front verandah would be.
202. Ms Sheales instructed her solicitor to prepare a new contract to reflect the agreement to repair. The new contract contained special conditions including a requirement to "*replace and install any and all damaged or defective decking boards on both the front and rear patios*". She signed the contract on 20 April 2010. Ms Sheales told the court her expectation was that a professional tradesman would be able to identify all the "*damaged or defective decking boards on both the front and rear patios*" and rectify them.
203. Mr Diefenbach says Ms Sheales told him one day at school while the property was still under contract that the whole verandah needed to be replaced. Ms Sheales' evidence does not support this. Although she cannot recall the specific conversation, she says she would have said something to the effect that "*I have signed another one, but it does have specific requirements for repairs*" but she couldn't say whether she outlined the specifics.
204. Mr O'Reilly had trouble contacting Mr Lagos to sign the new contract. He tried to phone Mr Lagos several times a day and was leaving messages for him. Mr O'Reilly had phone contact with him on 7 May (after being advised by Hannah Matheson that she had spoken to him that day) and arranged for Mr Lagos to sign the contract after his return from Fiji on 13 May 2010. Mr Lagos signed the new contract on Sunday 16 May 2010 and returned to work in Middlemount from 16 May – 3 June 2010.
205. Mr O'Reilly recalls that Mr Lagos told him at the time of signing the contract that he would arrange for Mr Clarke to finish all of the rectification work required to complete the sale but no discussion of the progress of the work was had.
206. Mr Clarke agrees that he probably did see Mr Lagos in the interval between his return to Yeppoon on 14 May 2010 and his departure for work in Middlemount on 16 May 2010. Mr Clarke cannot recall a specific conversation with Mr Lagos about his progress with the rectification work, but

considers it likely that Mr Lagos asked him about it. Despite this, Mr Clarke maintains that he was not made aware of the second contract and its settlement date. Mr Lagos is sure he would have mentioned the contract and settlement date to Mr Clarke but despite being motivated for this sale to go through, he acknowledges that he did not take any steps to assess how much work Mr Clarke had actually done.

207. It is reasonable to infer from their evidence that Mr Lagos and Mr Clarke each had a very casual approach to the rectification work and ensuring that Mr Lagos was well placed to satisfy the conditions of the second contract by the time of settlement on 28 May.

#### **Diefenbachs issue Notice to Remedy Breach:**

208. The Diefenbach's inquest application suggests Ms Diefenbach continued to phone ORRE and leave messages for Ms Matheson for several weeks after Mr Clarke attended the second time. It suggests that on 25 May 2010, Ms Matheson told Ms Diefenbach that Mr Lagos was "*overseas and uncontactable*". The agency file does not document this conversation. The last documented conversation between Ms Matheson and Ms Diefenbach was on 7 May 2010 in response to the incident involving Mrs Diefenbach.
209. Ms Diefenbach says that by late May 2010 she felt she was "*getting nowhere*" with ORRE fixing the problems with the property, especially the front verandah. She sought advice from the Residential Tenancies Authority about the situation in early May and subsequently completed a Notice to Remedy Breach and a Dispute Resolution Request. She was not aware of the procedures regarding emergency repairs.
210. Ms Diefenbach says she took this action because when nothing had happened by late May 2010 she "*got really angry and annoyed*" rather than being concerned about the imminent risk of injury. She acknowledged under cross-examination by counsel for ORRE that there were no further incidents involving the front verandah – her issue was that no progress was being made to replace the remaining boards on the front verandah.
211. It is not disputed that Ms Diefenbach delivered the Notice to Remedy Breach to ORRE and handed it to Jana Hawkes late in afternoon of Wednesday 26 May 2010. Ms Diefenbach posted the other form to RTA the next day.
212. Ms Diefenbach says she was aware of the contract settlement date when she took this step and agreed that issuing the notice to remedy breach at this time was an opportunity to apply pressure on the owner to respond to her concerns and further, that if the repairs were not done within a week, they could leave the property without any penalties.
213. The Notice to Remedy Breach reported the "*home is unsafe & dangerous. Repairs have not been completed. Pest control not done.*" It required the breach to be remedied by 2 June 2010. Ms Diefenbach explained that she

did not particularise her concerns about the front verandah because she assumed ORRE would know what she meant.

214. It is not disputed that Jana Hawkes gave the notice to Ms Matheson as soon as she returned to the office that afternoon. Ms Matheson first telephoned Ms Diefenbach on 28 May to discuss the notice at 10:08am ( the computer record shows a note that she asked Ms Diefenbach to provide a list of everything that was a problem and said she would phone Mr Lagos).
215. At 1.13pm that day, Ms Diefenbach emailed a list of outstanding repairs to Ms Matheson, including "*front verandah & stairs need replacing. Wood is rotten. Only a few planks of wood have been replaced.*" There was no further contact between Ms Diefenbach and Ms Matheson about the notice to remedy breach after this time. Ms Matheson did not contact Mr Lagos about the notice as she considered that some of the items listed in Ms Diefenbach's email (bathroom leak, blocked toilet, trees scraping on the roof) had already been attended to. She says that she had already spoken to Mr Lagos about the front verandah and understood he was dealing with it and she had no reason to believe the repairs had not been completed by then. Consequently, she considered there was no urgency to deal with any of those issues or any need to make further enquires about whether the front verandah was safe to use. Under cross-examination by counsel for the family, Ms Matheson acknowledged that it never occurred to her that the condition of the front verandah might pose a serious safety risk.
216. The agency files contains an email from Mr Lagos to Mr O'Reilly sent on the evening of Monday 31 May 2010 advising he received a copy of the notice that day.
217. Ms Matheson should have made further enquires about the status of the front verandah repairs at this time, given it had been several weeks since Mr Lagos had advised her that he was arranging for work to be done. Ms Diefenbach's email clearly suggests an expectation that more than a few boards needed to be replaced. In fairness to Ms Matheson, the then agency practices deprived her of a complete appreciation of the fact and significance of the identification of wood rot in the front verandah. She was not in a position to "connect the dots" when this issue was raised with ORRE yet again through the notice to remedy breach process.
218. Counsel for ORRE submits that expecting Ms Matheson to make further enquiries about the status of the front deck ignores the practical realities of her work environment. She was responsible for 350 properties which required regular inspections for various purposes and she spent most of her time out of the office. It is submitted that she may well have had more pressing issues on 28 May 2010. Further, it is submitted that even if enquiries were made, the likely outcome of those enquiries may not have advanced the matter.
219. I do not consider it necessary to make any findings on this point but it is curious that if the property managers were so overburdened by their regular workload such as to not have the ability or opportunity to follow up on issues

in a timely fashion then a restructure of that workload would surely have been considered. The act of “managing” does require some follow up on tasks to ensure their completion.

#### **Termination of second contract of sale:**

211. The second contract required the rectification work to be done to the satisfaction of Ms Sheales and her builder, Mr Lilliboe. Ms Sheales had arranged to meet Mr Lilliboe at the property on 27 May 2010, but he did not turn up. Ms Sheales says she walked up the front stairs to see if the Diefenbachs were home, but they were not. She recalled noticing that one of treads on the front stairs and some boards near the front door had been replaced. It appeared to her that minimal repairs had been carried out. She then left the property. Ms Sheales says she then spoke to Mr Diefenbach at school the next day, being the settlement date. She asked him specifically if the front and the back verandahs had been repaired. She recalls what he told her indicated very little work had been done. She says it was during this conversation that Mr Diefenbach told her they had issued a notice to remedy breach.
212. Ms Sheales then met with her solicitor that afternoon and instructed him to terminate the contract. The agency file contains a copy of the termination letter to Mr Lagos. It indicates among other things the restoration work on the front deck was incomplete. Mr Lagos says he later received an email from the solicitor sent at 4:56pm on 28 May 2010 advising him of the termination. He told the court he was surprised that the contract had fallen through as he thought Mr Clarke had done all of the rectification work and done it to a standard that would pass an inspection, and there had been no prior communication from the solicitor that the work was not being done.

#### **Events of 29 May 2011:**

220. The Diefenbachs had been out shopping on the morning of 29 May 2010. Isabella was unsettled on their return home at about 11:45am. Ms Diefenbach tried to feed Isabella and after being unable to settle her and feeling very stressed, she gave her to Mr Diefenbach to settle. Mr Diefenbach walked Isabella around, nursing her over his shoulder. He initially walked her around the house and then took Isabella out on to the front verandah for fresh air and sunshine. He went out there at about 12:10pm. Ms Diefenbach said she had no concerns about him taking Isabella out there.
221. Mr Diefenbach recalls holding Isabella with his right arm wrapped across her bottom and legs. All her weight was on his shoulder. He says she was resting securely on his shoulder asleep, not moving or squirming.
222. Ms Diefenbach went into Isabella’s room to put clothes away. Isabella’s room was located at the front left corner of the house, overlooking the front stairs. She could see her husband and Isabella on the verandah clearly from her position near the windows. Ms Diefenbach recalls he was walking around mainly in the north-west corner of the verandah.

223. Mr Diefenbach told Police he noticed a rotten board in the north-west corner of the verandah about one metre in from each railing. He also noticed others that appeared to be in a similar state of disrepair. He stated that he noticed some give in the board and that it appeared more visibly weathered than other boards. Ms Diefenbach told the court that her husband subsequently told her that his attention was drawn to the board because it made a cracking noise. Ms Diefenbach did not hear this noise.
224. Mr Diefenbach called out to Ms Diefenbach to come out and see the board. He was standing still and upright when he got her attention. Ms Diefenbach recalls he made a comment to the effect "*these panels are really rotten. Look at this one.*" The board was the 6<sup>th</sup> board in from the northern end of the verandah. Mr Diefenbach says he had not noticed this board previously and Ms Diefenbach had not previously drawn it to his attention. He didn't believe they had brought this board to the attention of ORRE previously. Ms Diefenbach could not recall whether she, Adam or any of their visitors had previously noticed this board. It is noted that during Mr Diefenbach's Police interview, Lyn Diefenbach is recorded as saying "*I gave that a poke the other day...that one yeah I said to Jenny ohh this one looks a bit suss*".
225. Ms Diefenbach recalls that Adam was facing west (towards the steps) and slightly towards her. Mr Diefenbach told Police he then put his right foot onto the board "*very lightly*" to show her which board was rotten. His subsequent statement to the Coroner clarified that he "*tapped the board very lightly with my extended toe lengthways (as opposed to across) the board*". He assumed it was a board parallel to the left of the board he fell through. He says he did this to point the board out to Ms Diefenbach. He says his left foot was on a different board but he did not notice which one. He told Police during the interview given on 29 May 2010 when he said "*I was showing Jenny a loose plank like it was making a little bit of noise so I just put my foot on it and it just went straight through...*"
226. Ms Diefenbach's evidence was that she saw Mr Diefenbach step out lightly, hardly putting any weight on the board when he tapped it. His statement to the Coroner clarified that his foot went straight through the board because the section he tapped cracked and broke off completely. He recalls hearing a slight simultaneous cracking noise as the board broke. His foot fell through to up to about the shin area. This caused him to pitch forward and lose balance. As this happened, he instinctively stretched his arms out to stop himself from falling. This propelled Isabella forward off his shoulder and over the right hand side railing. He says he did not completely fall over because most of his body weight was on his left foot. His ankle was scraped in the incident.
227. Ms Diefenbach saw his foot go through the board and heard a fairly loud cracking noise as this happened. She saw his body move forward and downwards a bit in the direction of the western railing. As this happened, she saw Isabella fall from Mr Diefenbach's arms over the western railing. Mr Diefenbach immediately ran down the stairs and started yelling "*she's dead, she's dead*".

228. Ms Diefenbach immediately ran down the front stairs and saw Isabella lying on some concrete mosaic tiles near the bottom of the front steps. She recalls Isabella was lying with her head on the concrete with her legs on the bottom step. Isabella was not crying but was breathing and making gurgling sounds. She had a large lump on the right side of her head near her ear.
229. Ms Diefenbach picked her up and brought her inside the house. She laid Isabella on a rug in the lounge room and called 000. The QAS records show this call was made at 12:23pm and an ambulance dispatched at 12:24pm. While Ms Diefenbach was speaking to the QAS operator, Isabella was gurgling and taking deep breaths. She placed her in the recovery position and started to give her EAR.
230. Mr Diefenbach was extremely distressed and had phoned his mother while this was happening. He then tried unsuccessfully to phone his mother-in-law (who was eventually phoned after the paramedics arrived). Their respective mothers both arrived at the scene before Isabella was transported to hospital by ambulance.
231. The QAS records show paramedics arrived on scene at 12:28pm. Isabella was not breathing and noted to have a large closed head injury on the left side of her head. Isabella's condition deteriorated into full cardiac arrest as she was being transferred to the ambulance and transported to Yeppoon Base Hospital. The QAS records show the ambulance left the scene at 12:39pm and arrived at the hospital at 12:43pm. Resuscitation efforts at Yeppoon Base Hospital achieved a spontaneous return of circulation shortly before 1:00pm. Arrangements were then made to transfer Isabella to Rockhampton Hospital which occurred at 1:26pm. Isabella deteriorated into cardiac arrest en route. Unfortunately, despite resuscitation efforts by the accompanying medical officer, she could not be revived. Isabella was declared dead on arrival at Rockhampton Hospital at 1:55pm.

#### **Autopsy findings:**

232. A full autopsy performed by Dr Nigel Buxton on 31 May 2011 confirmed the cause of Isabella's death as extensive cerebral destruction as a result of fractured skull following a fall from height. Dr Buxton considered Isabella's injuries were entirely consistent with the sequence of events described by the Diefenbachs and he found there was no evidence of deliberate assault. Dr Buxton considered the linear mark on the right side of Isabella's head indicated her head came into contact with a step before she fell to the ground.

#### **Police investigation:**

233. Isabella's death was reported to Police at 2:00pm on 29 May 2010. Officers from the Child Protection Investigation Unit, Scientific Section and Scenes of Crime attended Rockhampton Hospital. Yeppoon Police attended the family home and declared a crime scene while scientific officers, scenes of crime

officers and forensic crash investigation officers and detectives from the Yeppoon Criminal Investigation Branch attended and processed the scene.

234. Yeppoon CIB seized records relating to their management and sale of the property from O'Reilly's Real Estate on the evening of 29 May 2010. Mr and Mrs O'Reilly were interstate at the time, so several of their staff including Katie O'Reilly, Briny Hawkes and Hannah Matheson attended to assist police that evening. The production of documents took several hours. The investigating officer told the court that the ORRE staff were co-operative in providing their documentation and she was satisfied they had provided everything they could locate that evening.
235. Yeppoon CIB arranged for Council Building Inspectors to assess the condition of the front verandah. This inspection took place on Sunday 30 May 2010. The inspection was conducted by two qualified and experienced building inspector certifiers from the Rockhampton Regional Council, including the Operations Manager of Development and Compliance, David Battese. Mr Battese provided a report of the outcomes of the inspection and gave evidence at the inquest.
236. The inspection determined that:
  - i. the front verandah was approximately 15 years old;
  - ii. it was generally compliant with building standards;
  - iii. it generally appeared to be in a structurally sound condition;
  - iv. some joists and decking members had defects which appeared to be the result of age and exposure;
  - v. several boards adjacent to the failed board had questionable deflection on application of full body weight when applied with a springing motion – these were 2-3 boards on the house side of the failed board and one board on the other side. The hole depicted in exhibit B3.2.1, photograph 12, and subsequently replaced by Mr Clarke was on the outer edge of this area;
  - vi. the joists in the area where the failure occurred were more widely spaced than most other sections of the verandah; and
  - vii. although only a few sections of decking had questionable structural capacity, given the age of the decking, all of the decking should be replaced.
237. The joists and decking were subsequently replaced and passed Council inspection on 23 July 2010. The decision to replace the deck was thought by Mr Battese to be “a better risk management process”. Mr Battese considered the deck to be sound with a few sections with “*questionable structural capacity*”.
238. The Police investigation concluded that there was no evidence to suggest any deliberate act by Mr Diefenbach to cause Isabella to fall in this incident, and there was no evidence to suggest that deliberate damage caused the floor board to fail. They also found that the Diefenbachs made numerous complaints to O'Reilly's Real Estate about maintenance issues, including the

condition of the front verandah boards and O'Reilly's Real Estate were aware of the concerns about the condition of the front verandah. Further, the Police found that Mr Lagos was aware of the condition of the front verandah boards prior to Isabella's death. It was considered that there was no evidence of a criminal offence and there were no suspicious circumstances relating to Isabella's death.

239. An Information Requirement for the complete ORRE records relating to the property and the documents provided in response to this order were more extensive than those seized by police on the evening of 29 May 2010. It was evident that the information relating to the property was not contained in a discreet file or even a number of them but there were various documents located in many places including a number of computer systems. This fact would have hampered the staff's ability to monitor the developments with the property management and sale and certainly impacted on the efficient and timely production of documents for the coronial investigation. ORRE continued to locate and provide additional documents relating to the property up to immediately prior to the inquest hearing in October 2011 and the final day of evidence on 19 March 2012.

**Expert opinion:**

240. The Inquest was informed by a report and oral evidence of Colin McKenzie, a qualified and experienced engineer specialising in timber engineering and design, who is employed by Timber Queensland Ltd. Mr McKenzie was engaged on behalf of ORRE provide an opinion about the following issues:
241. Mr McKenzie identified extensive decay at or near the failure zone evident throughout the depth of the failed board. He estimated this degree of deterioration may have left board with only around 10% or so of its new strength properties (this was an educated guess because of his inability to undertake destructive mechanical testing on the board).
242. He found some decay in the boards either side of the failed board but to a lesser extent than that detected in the failed board. He did not see anything to indicate either of these boards still did not have a reasonable degree of strength and agreed this was consistent with Battese's finding of give in these boards when inspected on 30 May 2010.
243. Mr McKenzie considered there were no significant visual indicators of this extent deterioration from on top, other than the general weathered nature of the decking and paint finish, but the deterioration was evident from underneath because of the presence of fungal hyphae on wood surfaces. He also considered there were visual indicators of wood decay evident in exhibit B3.2.1, photograph 12 and exhibit F5, including the hole, splits in the timber and another possible pocket of decay.
244. He thought that the indicators in one or more boards should have triggered concerns in the mind of a person with building qualifications and experience about the possibility of more extensive deterioration across the verandah and

prompted further investigation for other non-visual indicators of decay and that the extent of deterioration would have been evident to a person with building qualifications and experience from a visual inspection of the underside of the front verandah and by probing the boards with a sharp instrument.

245. Mr McKenzie considered that it was “*very visually obvious*” to a person with building qualifications and experience inspecting the underside of the front verandah that there was significant cause for concern about the extent of wood rot and termite damage – there was sufficient visual evidence that more detailed investigation was required. He stated that it is reasonable to expect a person with building qualifications and experience to investigate the wood rot by inspecting the structure from both above and below; probing suspect boards with a sharp instrument such a drill or tapping them with a hammer; applying weight to suspect boards with or without a springing motion; to check adjacent boards for deterioration before an affected board is replaced with a new board.
246. Mr McKenzie suggested property managers be given guidance about what to look for when inspecting decks from both above and below, and these observations should be a trigger for them to recommend the need for expert inspection. He nominated resources published by the Department of Local Government and Planning and the Building Services Authority as appropriate resources in this respect.
247. Mr McKenzie disagreed with Mr Van Hese’s evidence that it is very rare to find wood rot in a low traffic area – the extent to which an area is trafficked has no bearing on the development of decay. He identified the location of the initial failure as immediately adjacent to the face of the joist and/or on the tension edge of the underside of the board and considered the failure started on the underside of the board and progressed very rapidly.
248. Mr McKenzie agreed with Mr Lilliboe’s opinion that “*if the board is really thin, you’d just break it by stepping on it. It would crack on you at least*” on the basis that Mr Lilliboe was referring to a decayed board with a thin amount of sound timber; and considered that unless the failed board was previously cracked, it would not have failed from a light tap with an extended toe, as described in Mr Diefenbach’s statement. His opinion was that the board could easily have failed from a reasonable static load (ie equally shared weight over two feet) or a heavier impact by foot. After considering Ms Diefenbach’s evidence that Mr Diefenbach’s attention was drawn to the board because he heard a cracking noise, Mr McKenzie agreed it was possible the board could well have cracked under Mr Diefenbach’s weight prior to him using his foot to point out the board to Ms Diefenbach.
249. Mr McKenzie considered the Department of Local Government and Planning deck safety guideline required some improvement insofar as it addressed the topic of wood rot; and agreed it was very important for domestic decks to be inspected regularly.

## **ISSUES**

### **A. *Extent of the tenants' concerns about the condition of the front verandah and extent to which the tenants communicated those concerns to ORRE personnel***

250. Ms Maas either did not seem to have highlighted any concerns about the front verandah to ORRE personnel, the condition of the front verandah was not communicated as a safety and/or amenity issue requiring urgent attention. It is clear that her concerns regarding a number of maintenance issues were raised during the tenancy and its likely that the verandah was spoken of in this context. Ms Maas' comments regarding her concerns following this tragically somewhat understandably have the effect of an overstatement of her concerns at the time of her tenancy.
251. Ms Diefenbach was vigilant in identifying, reporting and following up progress on maintenance and repair issues identified via the entry condition report process and emerging over the course of the tenancy. Ms Diefenbach identified the presence of wood rot in the front verandah at the outset of their tenancy and formally reported this finding to ORRE personnel:
- i. via the entry condition report on 10 November 2009;
  - ii. via the first routine inspection on 1 February 2010;
  - iii. when she reported the incident involving Lyn Diefenbach; and
  - iv. via the notice to remedy breach process over 26-28 May 2010.
252. Ms Diefenbach's identification of the presence of wood rot in the front verandah was objectively verified by the findings of the termite inspection on 19 November 2009 and the pre-purchase inspection on 8 March 2010.
253. Ms Diefenbach reported her concerns to Jana Hawkes and Hannah Matheson about the need for the front verandah to be repaired. Her evidence as to the frequency of the contact is not documented in the ORRE file. The inspection by Ms Stevens of the front verandah on 4/2/10 and her subsequent report clearly shows that Ms Diefenbach had raised her concerns at that time. Counsel for the Family submits that once the issue was raised, it was unsurprising that further complaints or follow-ups by Ms Diefenbach would not be recorded on the file and that the lack of documentation in the file does not diminish Ms Diefenbach's evidence that she raised the issue on a number of occasions.
254. The Diefenbachs had no knowledge or understanding of the potential consequences of wood rot yet they appropriately reported its presence in the front verandah and the front steps to ORRE. It would not be expected that a tenant have this type of knowledge. At no stage did they hold concerns that it posed an imminent safety risk (other than in a general and minor sense) and further, the fact of its presence did not greatly prevent them or their visitors from regularly using these structures to enter and exit the dwelling during the tenancy. As at 29 May 2010, the Diefenbachs quite reasonably did not

appreciate the risk that anyone could be injured in the near future because of the condition of the front verandah.

255. Counsel for ORRE submitted that the Diefenbachs did not raise the issue as an imminent safety risk, and the same can be said of Mr Van Hese, Mr Lilleboe and Mr Clarke who all inspected the deck. Further, it is submitted that there is no evidence that the particular board which collapsed on 29 May 2010 had been identified by Ms Maas, the Diefenbachs, the building inspectors, Mr Clarke or anyone else as having been potentially dangerous.
256. It is clear from the evidence that there were parts of the verandah which did require attention. It is obvious that no-one, least of all the Diefenbachs, anticipated any consequences of use of the verandah in its condition, beyond perhaps a heel going through a board. Certainly, the occurrence of a person's foot going through a board to the extent that happened and the tragic consequence of that event was not anticipated by any of the persons who had seen or inspected the deck. However, it is also clear that if the deck was in a sound condition as a whole then this tragic incident would not have happened.

**B. *Adequacy and timeliness of the response of ORRE to personnel to the identification of wood rot in the front verandah***

257. The agency file produced to the court cannot be relied on as a complete and definitive record of ORRE's interactions with Ms Diefenbach and others. The contents of the documentation in the various mediums that loosely make up the file on this property does not fully accord with the evidence of several of the ORRE employees or the tenants of the property in the sense of being a complete and accurate record of dealings with the property. The difficulties encountered by staff in doing their best to assist Police in the provision of documents, are also indicative of a fractured and disjointed system of recording information on the property. This fact lends the situation to the very real potential of incomplete information being available to ORRE staff in their practical dealings with the issues surrounding the property.
258. By and large, the ORRE property management personnel actioned the range of maintenance and repair issues emerging during both the Maas and Diefenbach tenancies with the owner in an appropriate and timely fashion. This was to a large part facilitated by the accessibility and responsiveness of Ms Prins until she withdrew her involvement in early February 2010. It clearly became harder for the ORRE property management personnel to obtain instructions from Mr Lagos after this time because of his limited contactability during business hours.
259. However, the management by ORRE property management personnel of the identification by Ms Diefenbach and independent contractors of the presence of wood rot in the front verandah was suboptimal. None of the property managers actively considered whether the presence of wood rot in a structural component of the property constituted a matter requiring an emergency repair under the *Residential Tenancies and Rooming Accommodation Act 2008*.

260. Briny Hawkes failed to notify Mr Lagos of the finding of wood rot reported by Ms Diefenbach via the entry condition report or to take any other action in respect of that notification. Hannah Matheson did not read the November 2009 termite inspection report or when posting it to Mr Lagos, send it under cover of a letter that drew his attention its findings and recommendation for further expert inspection of the wood rot – it is acknowledged that Ms Matheson was acting under an agency directive not to take these actions in respect of building, pest and termite inspection reports.
261. The inspections of the front verandah conducted by Chantal Stevens and Briny Hawkes during their respective routine inspections of the property were at best cursory and inadequate. Chantal Stevens was not qualified to make an assessment that the front steps and the front verandah were not dangerous and it was not appropriate for her to convey this assessment to Mr Lagos without a recommendation that he provide instructions for further expert inspection of these structures.
262. It was reasonable for Mr O'Reilly to rely on the findings of the pre-purchase inspection but Mr O'Reilly did not inform the property managers of the findings of the pre-purchase inspection and subsequent inspections with Mr Lilliboe and Mr Clarke which culminated in an agreement for repair work to be done to the front verandah under the second contract of sale.
263. Ms Matheson did not seek further clarification from either Mr Lagos or Ms Diefenbach about the extent of repair work being or expected to be done on the front verandah, either when she spoke with Mr Lagos on 7 May 2010 or after she received Ms Diefenbach's email on 28 May 2010.
264. The following factors contributed to the property managers' joint failure to consider the potential safety hazard posed by wood rot in the front verandah as an emergency repair issue and seek timely and appropriate instructions from Mr Lagos for further expert inspection of this structure:
- i. none of the property managers had any knowledge or training about wood rot and its potential consequences or how to properly inspect the condition of a deck for property management purposes;
  - ii. the then current ORRE business structure and agency practices did not facilitate adequate communication between and with the property managers about the status of emerging maintenance and repair issues for the property, both before and after the property was listed for sale with the agency; and
  - iii. the agency directive not to read building, pest or termite inspection reports arguably falls short of accepted industry practice but irrespective, created an unacceptable situation where the property managers had no knowledge of an appropriately qualified inspector's assessment of the extent of the presence of wood rot in the front verandah and his recommendations about what action should be taken by the owner in respect of that finding.

265. The family of Isabella submitted that they have PROFOUND concerns about the policy at ORRE that agents were not to read reports of building or other experts, and, in particular, are appalled that this practice has not changed since the death of Isabella.
266. Counsel for the Family submitted that there was no reason why the property managers could not read the report in an effort to glean, from a lay person's perspective, whether there are any urgent or other repairs required. The direction not to read the report is a misdirected attempt to avoid liability and shift to its owner: the failure to read the report is in fact likely to expose the property manager to a greater liability, particularly if the report identifies urgent repair.
267. It is submitted by Counsel for ORRE that the procedure at ORRE of forwarding reports to landlords without identifying for themselves or the landlord the potential issues raised in the report did not fall short of industry practice as it was in accordance with advice provided to them by two different training organisations.
268. While it is unreasonable to have expected the property managers themselves to have assessed the extent to which the wood rot had affected the structural integrity of the front verandah, it is reasonable to have expected them to take more proactive steps to bring the issue to the owner's attention at the outset of the Diefenbach tenancy with a recommendation that the issue required further independent expert investigation.
269. It was further submitted by the Family that the property agent and owner, and where necessary, the tenant, could be appropriately advised of the impact of the report (after clarification is sought from the report writer if need be).
270. Mr Clarke was engaged directly by Mr Lagos (as was Mr Lagos' prerogative). He chose a trade-qualified but unlicensed carpenter who was a close friend and willing to carry out the work at cost. It was not incumbent on Mr O'Reilly to make further enquiries about Mr Clarke's licensed status given Mr Lagos referred to Mr Clarke as "my builder friend".
271. The court acknowledges ORRE's efforts to review its property management business structure and, in part, broader agency practices to address the deficiencies identified during the inquest.

**C. Adequacy and timeliness of Mr Lagos' response to the identification of wood rot in the front verandah**

272. For as long as Ms Prins was involved with the property management, she was generally contactable when ORRE sought instructions from her and gave prompt instructions to ORRE staff to attend to various maintenance and repair issues during the Maas and Diefenbach tenancies.
273. Mr Lagos' employment situation made him very difficult to contact during business hours. This meant that matters for which he was asked to give

instructions, either by Ms Prins or directly by ORRE, generally took longer to resolve, or in some cases such as the bathroom leak, did not resolve at all. Neither he nor ORRE personnel ever took proactive steps to formally establish the most reliable method and time for him to be contacted about the property.

274. It is clear that Mr Lagos did spend money on the property during the Maas and Diefenbach tenancies and the extent of his action was not evidently from a desire to spend less than was reasonably required to attend to the issues, although he was obviously prudent with his spending (as evidenced by his engaging Mr Clarke at “mates rates”).
275. Mr Lagos had access to a range of information identifying the presence of wood rot in the front verandah of the property. These include:
- i. the November 2009 termite inspection report received at his mother’s address but is likely only to have read the termite treatment proposal which accompanied the report;
  - ii. advice from Chantal Stevens about the outcomes of the first routine inspection – while it was not unreasonable for Mr Lagos to rely on Ms Steven’s advice that the front steps and the front verandah were not dangerous per se, it would have been prudent for Mr Lagos, who readily acknowledged the property managers did not have building knowledge or expertise, to have the issue investigated further by an appropriately licensed tradesperson at that time;
  - iii. the findings of the pre-purchase inspection reports – although the reports were provided to him by his solicitor in an unreadable format and Mr Lagos made no efforts to obtain further copies, the weight of the evidence supports a finding that he was well aware of the inspection findings once he attended the inspection on 25 March 2010, as he had access to the copies brought by Mr O’Reilly on that occasion; and
  - iv. the outcomes of his inspection of the property with Mr O’Reilly and Mr Clarke on 25 March 2010.
276. There was only one occasion on which ORRE property management personnel actively sought instructions from Mr Lagos regarding a matter relating to the condition of the front verandah – the damage reported to him by Hannah Matheson on 7 May 2010. Mr Lagos provided prompt advice on this occasion about how he intended to respond to the situation and subsequently arranged for the damage to be repaired within a short period after his phone conversation with Ms Matheson.
277. Mr Lagos had no knowledge or understanding of the potential consequences of wood rot. On this basis, it was reasonable for him to rely on the findings on the pre-purchase inspection reports and the opinion of his trade-qualified carpenter friend Mr Clarke about the work required to be done to remedy the defects identified by the pre-purchase inspection.

278. Mr McKenzie's expert opinion that there were sufficient visual indicators on the underside of the front verandah to cause a person with building qualifications, skills and experience to have significant concerns about the extent of wood decay and termite damage, is accepted. On this basis, it is concerning that the extent of wood rot was not identified by Mr Van Hese, Mr Lilliboe or Mr Clarke.
279. Mr Clarke was best placed of any of the contractors who inspected the front verandah to identify the extent to which the front verandah was affected by wood rot. This is because he had the time and opportunity to conduct a more thorough, invasive examination of the condition of the front verandah during his two work attendances at the property. In carrying out repair work on the front verandah in April and May 2010, Mr Clarke failed to conduct an appropriate or sufficiently thorough investigation of the structure, in circumstances where he already knew parts of it were affected by wood rot. Having regard to Mr Battese's evidence about his observations of these boards on 30 May 2010 and Mr McKenzie's expert opinion about the extent of decay in the failed board and those immediately adjacent to it, it is clear that a more thorough investigation of the front verandah by Mr Clarke could and should have detected the extent to which these boards had deteriorated.
280. Counsel for Mr Lagos submitted that Mr Lagos' evidence be accepted that he believed Mr Clarke to be a competent and experienced carpenter and that he had satisfactorily completed the work that he had been asked to do following the inspection at which he was present with Mr Lagos and Mr O'Reilly. Further it was submitted that whilst Mr Clarke may not have been a licensed builder, and it was not untoward or unusual that work of this type be done by a tradesman.
281. There is no evidence that Mr Lagos was advised that there was wood rot in the decking boards until the issue came up during the sale contract. His instructions were not sought before then about the need for any emergency repairs. After the inspection with Mr O'Reilly, Mr Lagos was under the impression that Mr Clarke would have finished the work and that it would have passed inspection by Mrs Sheale's builder for the completion of the second contract, which he did not appreciate had not completed until after this tragedy. There appears to have been no notification to Mr Lagos by any party that the rectification work had not been satisfactorily completed.

***D. The circumstances in which the board failed on 29 May 2010***

282. Having regard to Mr McKenzie's expert opinion about the extent to which the failed board was affected by wood rot and his agreement that it was possible for the board to have cracked under Mr Diefenbach's weight prior to him stepping out lightly to show the board to Ms Diefenbach, the Diefenbachs' version of the how the incident occurred is accepted.

**Real Estate Industry**

283. As at 2010, property managers in Queensland were required to be licensed with the Office of Fair Trading. The license allowed a property manager to negotiate the renting of properties, inspect and assess properties for rent, advertise properties for rent and open up properties for inspection for rent. However, some responsibilities did not need licensing, for example, carrying out routine inspections.
284. In order to qualify for a real estate license, the training requirements were limited to the completion of seven competencies from a training package recognised by the Office of Fair Trading with one of these competencies provided any education in relation to property management. None of these competencies provided any instruction and/or education in relation to:
- (i) The inspection of decks; or
  - (ii) The REIQ's current best practice approach to the steps to be taken by property managers with respect to building and pest reports.
- There was no legislative or other requirement for a real estate agency to be accredited with or to be a member of the REIQ.
285. The training (for the licence and property management) was provided by a number of organisations, of which the REIQ was only one. Others were Real Estate Dynamics ("RED") which has provided training to more than half of the property managers throughout Queensland and, Stacey Holt from Real Estate Excellence who has been in the real estate industry for in excess of 20 years, initially as a property manager and for the most recent eight years as an industry trainer (Ms Holt provided training for the REIQ between 2004 and 2010).
286. It is clear from the evidence that there is a lack of uniformity in the real estate industry concerning the provision of building and pest control reports to lessors/landlords. According to the REIQ's submission dated 1 February 2012, their current training in relation to its "best practice" approach to the steps to be undertaken by property managers with respect to building and pest inspection reports is outlined. This includes careful reading of the report to determine whether any defects in the property have been identified and repair work recommended, forward the report to the lessor highlighting those issues and seeking written instructions, arrange emergency repairs directly if relevant, and implement a follow up system to ensure that the issues is dealt with. There is no evidence as to whether this "best practice" was applicable prior to Isabella's death. It is submitted by Counsel for ORRE that this "best practice" does not reflect legislative requirements and accepted industry practice levels (report should be forwarded to the landlord with a recommendation that the landlord contact the author of the report for further explanation and advice). The training received by ORRE was to this effect.

### **Improvements in training for property managers:**

287. It would seem that the training provided for property managers at an industry level is inadequate. Training is provided by up to eight different organisations and does not appear to be co-ordinated as to content to enable a consistent approach to industry standards being developed or maintained. There was,

and continues to be, no peak body or association charged with the responsibility of providing guidelines, a uniform code of practice and the provision of continuing professional development to the industry.

288. REIQ acknowledges that its registration training course only provides property managers with a basic level of knowledge about property management and best practice. Consequently, it provides a supplementary two day property management essentials training program. The property management training currently provided by REIQ provides little, if any, meaningful instruction about how to properly inspect a deck or other structures when inspecting a dwelling prior to it being listed for rent, for an entry or exit condition report or for a routine inspection.
289. Property managers play a vital role in assisting property owners to ensure they meet their statutory obligations under the *Residential Tenancies and Rooming Accommodation Act 2008* including, amongst others, to ensure the premises are and remain clean, fit for the tenant to live in, are in good repair and comply with any relevant building requirements.
290. Of the four property managers involved in this matter, none had been provided with any relevant training in relation to the inspection of decks and indeed there appears to be no industry training available in relation to that specific issue.
291. The evidence given by each of the property managers who inspected the property during the Maas and Diefenbach tenancies makes it very clear that none of them had knowledge of wood rot or training about how to inspect a deck for property management purposes. This was reinforced by the evidence given by Mr O'Reilly and the further statement provided by Mrs O'Reilly.
292. The evidence is also clear that at no time during the Diefenbach tenancy did any of the property managers actively consider whether the presence of wood rot in the front verandah constituted a matter requiring an emergency repair under the *Residential Tenancies and Rooming Accommodation Act 2008*. REIQ's own training materials and other advice to its members document examples of serious injury and death caused by poorly maintained stairs and decks.
293. It is unreasonable to expect property managers who will invariably not possess building qualifications, skills and experience to assess the condition of structural components of a dwelling such as decks and stairs, without adequate training and guidance about what safety and amenity issues they need to be alert for, how to identify those issues, the minimum expected standard of inspection of these structures and the action they should recommend the lessor take in respect of any identified concerns about these structures.
294. Since this incident, the practice at ORRE has changed a little. Now the reports are forwarded to the landlord with a covering letter (rather than the

previous with compliments slip). It is unclear as to whether an improvement of this practice (including the drawing of the landlord's attention to the recommendations in the reports) would have meant that Mr Lagos would have taken more notice of the contents of the report but it certainly would have improved the chances of that happening.

295. It is appropriate that there be a review the current property management training program with a view to the issues raised in this matter including minimum standards in relation to the inspection of decks.

**Improvement of existing deck safety resources:**

296. In the wake of the Ascot deck collapse, the Department of Local Government and Planning (DLGP) produced a consumer guideline for the use, inspection and maintenance of decks, balconies and windows. Section 3 of this guideline incorporates a helpful discussion about wet rot and moisture and provides some instruction about what action should be taken if wet rot occurs. Section 4 of the guideline provides instruction about inspecting various structural components of decks and balconies. It is noted that this section does not incorporate specific guidance about what to look for when inspecting decking boards.
297. Both Mr Battese and Mr McKenzie agreed that improvements could and should be made to this guideline to incorporate specific reference to the identification of wet rot and the inspection of decking boards. Mr McKenzie agreed that this guideline and resources produced by the Building Services Authority could be used to inform the education of property managers about deck inspection.
298. It is appropriate for a review of the guideline to be conducted due to the circumstances of Isabella's death.
299. Mr Battese's evidence suggested that awareness of the guideline may be limited. Mr Battese gave evidence that the Rockhampton Regional Council had not taken any action on ensuring that the Deck, Balcony and Window Safety Guideline (Sept. 2010) was adhered to. Resources appear to be the major factor affecting inspections but he suggested that property owners could be made aware of the guidelines with the inclusion of them in the rates notice mailout.
300. Any review of the guideline should also consider opportunities to enhance ongoing public awareness of its existence and the need for building owners and occupiers to regularly check the safety of these structures. Possible options for consideration include advice to property owners about the guidelines at the point of building approval; advice to prospective purchasers at the point of council compliance search; advice to lessors when signing a property management agreement and advice to tenants when signing an initial residential tenancy agreement.

**Independent expert inspection of the structural integrity of residential rental properties with a deck, verandah or balcony:**

301. The *Residential Tenancies and Rooming Accommodation Act 2008* places certain obligations on the lessor regarding the general standard of residential rental premises. However, there is currently no statutory requirement for the condition of a residential rental property to be assessed or documented in any way prior to it being placed on the rental market.
302. The Tenants Union of Queensland has proposed a statutory requirement for the appointment of agent process to incorporate documentation of the condition of the property at the outset of the agency agreement. It would seem to be in the best interests of all concerned - the lessor, agent and future tenants - for there to be an independent expert assessment of the condition of a property from the time it is first placed on the rental market.
303. Mr Battese and Mr McKenzie both considered a proposal for compulsory inspection of properties with decks both prior to and during use for residential rental purposes was appropriate and Mr Battese considered that it would be appropriate for a property with a deck of 10 years age or older to be inspected every three years.
304. It is appropriate to make a recommendation for consideration of amendment to relevant legislation to introduce a system of mandatory inspections of a residential rental property with a deck, verandah or balcony that is of age before the property is placed on the rental market. The objective of the mandatory inspection proposal is to ensure the property meets the standards required under s.185 of the *Residential Tenancies and Rooming Accommodation Act 2008*. The development of these amendments should incorporate a cost-benefit analysis of this proposal and consultation with residential rental industry stakeholders. The cost-benefit analysis should include consideration of the various issues raised by REIQ in their submission to this inquest.

**Information disclosure to tenants about issues impacting on the structural integrity and safety of a residential rental property prior to and during a tenancy:**

305. The front verandah was inspected by a licensed tradesperson who was independent of Mr Lagos on three occasions – the November 2009 termite inspection by Mr Trotter; the early March 2010 pre-purchase inspections by Mr Van Hese and the mid-March inspection by Mr Lilliboe. Two of these inspections resulted in the preparation of inspection reports that identified the presence of wood rot in the front the verandah – an issue that ultimately impacted on the structural integrity of the decking boards in this case.
306. The Diefenbachs were aware that these inspections occurred because an entry notice was required to be issued for each inspection. However, they were not informed of the findings of either inspection insofar as they related to the identification of wood rot in various structural components of the property.

307. Further, the practice was that the tenants did not receive a copy of routine inspection reports. This meant that unless a maintenance or repair issue reported during an inspection was subsequently actioned by ORRE (with authorisation by Ms Prins or Mr Lagos), there was no formal feedback to the tenants about the issues they had raised.
308. Section 34 of the *Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2001* requires a property manager to promptly respond to and, subject to the lessor's instructions, attend to all requests by a customer for maintenance of, or repairs to, the property. It does not oblige the agent to advise the tenant of the lessor's decision not to authorise the requested maintenance or repair.
309. It is appropriate to make a recommendation for legislative amendment to require maintenance/repair information to be kept in a format that it can be easily disclosed to the relevant parties. The objective of this proposal is to better inform prospective and current tenants about the condition of a property and the status of any maintenance or repair issues.

**Clarification of a letting agent's responsibilities in relation to building, pest or inspection reports commissioned on behalf of the lessor:**

310. The ORRE property managers had been directed not to read, comment or provide advice to lessors about building, pest or termite inspection reports because they were not qualified to interpret those reports. This direction arose from advice given to ORRE by a property management consultant employed by Real Estate Dynamics. Real Estate Dynamics provides a range of services to the real estate industry, including property management training and support. This entity recommends that property managers only forward a building, pest or termite inspection report to the lessor as soon as it is received, with a covering letter recommending that the lessor directly contact the contractor who carried out the inspection for any explanation or advice.
311. REIQ was invited to comment on whether this practice represented accepted industry practice. REIQ considers that the following steps represent best practice when a property manager has been authorised by the lessor to commission a building, pest or termite inspection report:
- (a) the property manager should carefully read the report to determine whether any defects in the property have been identified and whether any repair works or maintenance is recommended;
  - (b) the property manager should forward the report to the lessor highlighting any relevant repair and maintenance issues identified and seek the lessor's written instructions in respect of those issues;
  - (c) in circumstances where the report identified serious repair and maintenance issues which pose an immediate risk to the tenant and visitors to the property, the property manager should seek urgent instructions to enable the property manager to arrange for the necessary repairs and maintenance as soon as possible; and

- (d) property managers should implement a diary or reminder system for following up instructions from lessors for all outstanding repair or maintenance issues. All follow up attempts and communication with lessors in relation to such matters should be recorded in writing and retained on the property management file.
312. Further, it is suggested that the direction given by ORRE to its employees (on the advice of Real Estate Dynamics) may conflict with the obligation under s.11 of the *Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2011* for a real estate agent appointed to lease property for a client to keep the client informed of any significant development or issue in relation to the property.
313. Cross-examination of Mr O'Reilly by Counsel for the Family demonstrated the unacceptable tension in a situation where the same property managers (who lack building qualifications, skills and experience) who conduct routine inspections and assess whether a property is in good repair are not permitted to read inspection reports prepared by licensed contractors that may identify imminent or potential safety risks requiring urgent action. It could be said that there might be a far greater potential for exposure to legal liability arising from inadequate routine inspections or failure to identify and respond to an emergency repair issue.
314. It was suggested during cross-examination of Mr O'Reilly by counsel for ORRE that the REIQ position on this issue was not necessarily representative of that of industry participants. Given that professional association membership is not compulsory for the real estate industry and real estate agents are not bound by REIQ policy statements, it seems appropriate to make a recommendation dealing with the responsibilities of communication of certain issues with lessors.

#### **Property management best practice issues:**

315. The evidence shows there were many deficiencies in the ORRE agency practices at the time that operated to deprive the property management team of a holistic understanding of the maintenance and repair issues arising during the Diefenbach tenancy, particularly those relating to the front verandah.
316. It is acknowledged that ORRE has since taken steps to address many of those deficiencies. Full integration of all property management records would largely address the communication challenges which were identified in this matter but the current computer systems at ORRE do not have that capacity. In an effort to address the immediate need to improve storage, retrieval and exchange of relevant information, ORRE have implemented the significant changes referred to in Mrs O'Reilly statement.
317. Various changes have been made across most areas of the practice at ORRE including a re-structure of the property management division with particular tasks allocated to various officers as opposed to the multi-task approach in the past (in particular one property manager is responsible for all routine

inspections on and maintenance issues for a particular property); in-house meetings with a framework for discussion of outstanding tasks and maintenance matters; systematic reference to entry and exit condition reports to ensure continuity of information relating to a particular property; reference to previous routine inspection reports at the time of all inspections for a particular property; formalisation of the complaints process in relation to maintenance issues with follow ups for action; retention of emails and documenting communications; the keeping of a detailed mail register; improved communication practices(including documentary) between property and sales departments; provision of an information CD to tenants on signing a lease; improvements in communication with difficult to contact landlords; and ongoing training for property management staff.

318. It is clear from the evidence that there is a general need for property management business structures to implement work practices that facilitate:
- (a) timely and systematic documentation of, and action on, all issues arising during a tenancy, particularly those relating to the condition of the properties they manage; and
  - (b) open flow of communication between members of the property management team and the sales team in circumstances where a rental property is listed for sale through the same agency.

**Ongoing education for tenants, lessors and their agents about their respective rights and obligations in respect of maintenance and repairs:**

321. Information provided by the Residential Tenancies Authority and other industry stakeholders demonstrates there is an impressive range of readily accessible information and advice for tenants, lessors and their agents about their rights and obligations in respect of maintenance and repair issues.
322. The circumstances leading to Isabella's death are a very compelling prompt for the need for relevant industry stakeholders to continue their efforts to reinforce the importance of regularly and properly maintaining residential rental properties. This requires commitment from:
- (a) tenants to promptly report and document emerging maintenance and repair issues;
  - (b) letting agents to comply with their obligation to promptly report those issues to, and seek instructions from, the lessor; and
  - (c) lessors to diligently consider those issues and respond promptly and appropriately to them, preferably with the assistance of licensed contractors.

**Input from residential tenancy industry stakeholders**

323. The inquest was also informed by contributions from the Department of Justice and Attorney-General (Office of Fair Trading), Residential Tenancies Authority (RTA), the Real Estate Institute of Queensland (REIQ) and the Tenants Union Queensland (TUQ) about possible preventative

recommendations regarding the obligations of tenants, lessors and their agents in respect of the maintenance of residential rental properties.

324. TUQ proposed a range of reform options. OFT, RTA, the Department of Local Government (DGLP) and the Local Government Association of Queensland (LGAQ) were given an opportunity to respond to these options.
325. REIQ was also given an opportunity to respond to various issues arising from the evidence given by ORRE witnesses during the October 2011 sitting.
326. REIQ provided copies of its property management training manuals.

### **Property Management Regulation**

327. Despite the requirement for registration of property managers, real estate agencies undertaking this work are not regulated and are not required to be a member of or be associated with an organisation such as REIQ. Additionally, landlords may decide to manage the property themselves and may move away from real estate agents if the requirements placed on them are considered too onerous or too costly. This could be potentially detrimental to tenants on a number of bases.

### ***Findings required under section 45(2) of the Coroners Act 2003:***

328. The coroner is required, to the extent possible to make the findings required under section 45(2) of the *Coroners Act 2003*. The investigation material tendered and the oral evidence heard during the inquest is sufficient to enable the following findings to be made:
  328. the identity of the deceased is Isabella Wren Diefenbach who was born on 6 April 2010;
  329. Isabella died from head injuries;
  330. Isabella died at the Rockhampton Base Hospital;
  331. Isabella died on 29 May 2010; and
  332. Isabella died after an accidental fall from her father's arms over the edge of the front verandah of her family's rented home at 12 Spring Street, Yeppoon. Mr Diefenbach lost hold of Isabella when he lost his balance as his foot fell through a decking board on the front verandah. The board was significantly decayed and is likely to have had less than 10% of its new strength properties at this time. It is likely the failure was initiated by the board cracking under Mr Diefenbach's weight shortly before he stepped out lightly with his right foot on the board to show its location to Ms Diefenbach. The Diefenbachs had identified the presence of wood rot in the front verandah and reported this to the letting agents, O'Reilly's Real Estate, on at least four occasions prior to Isabella's death. The lessor, Damien Lagos, was aware of the identification of wood rot in the front verandah prior to Isabella's death and some repairs had

been made before the incident. The Diefenbachs, ORRE personnel and Mr Lagos did not have any knowledge of wood rot and did not properly understand the potential safety hazard it posed.

Mr Lagos engaged a close friend Steven Clarke, who was a trade qualified but unlicensed carpenter, to carry out repairs of defects identified in a pre-purchase inspection conducted on 8 March 2010. These repairs included replacing five boards on the front verandah. Mr Clarke failed to conduct a sufficiently thorough investigation of the condition of the front verandah when carrying out these repairs in April and May 2010 and could and should have identified the extent to which the failed board and those adjacent to it had deteriorated.

O'Reillys Real Estate agency practices and a lack of training about how to properly inspect a deck for property management purposes combined to prevent the property managers from identifying the potential safety hazard posed by wood rot as an emergency repair and from seeking appropriate and timely instructions from Mr Lagos for further independent expert inspection of the front verandah. There were sufficient visual indicators on the underside of the verandah to cause a person with building qualifications, skills and experience to have significant concerns about the extent of wood decay and termite damage.

### **Coronial Comment**

333. Section 46(1) of the Coroners Act 2003 empowers the coroner to comment, whenever appropriate, on anything connected with Isabella's death that relates to public health and safety or the administration of justice or ways to prevent deaths from happening in similar circumstances in the future. Recent Queensland authority supports a broader than direct connection between any matter on which comment is made and the death under investigation.
334. There is a sufficient connection between Isabella's death and the broader policy issues of the obligations of tenants, lessors and their agents in respect of the maintenance of residential rental properties. There are a range of issues arising from the evidence relevant to section 46.

### **COMMENT / RECOMMENDATIONS**

**I make the following recommendations:**

- 1. That Office of Fair Trading and relevant residential rental industry stakeholders (including REIQ) review the current property management training program with a view to incorporating a component that provides property managers with an appropriate level of guidance about how to conduct a satisfactory inspection of decks, verandahs and stairs for property management purposes. This review should be undertaken with advice and input from entities including the Building Services Authority and Timber Queensland Ltd. The review should also consider a revision of the training about what constitutes an emergency repair, with a view**

to identifying potential structural compromise due to the effects of wood rot and termite activity as clearly falling into this category of repair.

2. That Office of Fair Trading and relevant residential rental industry stakeholders conduct an awareness campaign across the industry about the agreed minimum standards of inspection of decks, verandah and stairs for property management purposes and the need to actively consider potential structural compromise due to the effects of wood rot and termite activity as an emergency repair issue.
3. That the Department responsible for administering the *Building Act 1975* review the guideline (Department of Local Government and Planning (DLGP) Use, Inspection and Maintenance of decks, balconies and windows (Sept 2010) with a view to incorporating guidance about the inspection of decking boards for signs of deterioration that may compromise their structural integrity. This review should be informed with advice and input from entities including the Building Services Authority and Timber Queensland Ltd. Further that the reviewed guideline be brought to the attention of the building and real estate industries, local government authorities and, through them, landlords.
4. That the Department responsible for administering the *Property Agents and Motor Dealers Act 2000* and the *Residential Tenancies and Rooming Accommodation Act 2008* amend the relevant legislation to introduce a system of mandatory inspections by an independent licensed builder of the structural integrity of a residential rental property with a deck, verandah or balcony that is greater than 10 years old immediately prior to the property being placed on the rental market and thereafter at a minimum three year interval during its continued use as a rental property.
5. That the Department responsible for administering the *Property Agents and Motor Dealers Act 2000* and the *Residential Tenancies and Rooming Accommodation Act 2008* amend the relevant legislation to:
  - (a) require the lessor or the lessor's agent to maintain a register of all maintenance or repairs requested by a tenant or identified by the agent during a tenancy and the lessor's instructions in respect of each maintenance or repair item; and
  - (b) enable a prospective or current tenant, on request to the lessor or the lessor's agent, to inspect and take a copy of any of the following documents relating to a residential rental property that they propose to rent or are currently renting:
    - (i) a mandatory inspection report, as proposed above;
    - (ii) any building, pest or termite inspection report commissioned by or on behalf of the lessor;
    - (iii) any building, pest or termite inspection report commissioned by another person and in the possession of the lessor or the

lessor's agent ie pre-purchase inspection reports provided to the lessor or the lessor's agent;

- (iv) a prior entry or exit condition report;
  - (v) a routine inspection report; and
  - (vi) the maintenance register for a previous or current tenancy.
6. That the Department (responsible for administering the *Property Agents and Motor Dealers Act 2000*) amend the *Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2011* to deal specifically with the letting agent's responsibilities in relation to reading building, pest or termite inspection reports commissioned on behalf of the lessor and communicating the inspection outcomes and recommendations to the lessor for further written instructions, if required, particularly having regard to the circumstances of Isabella's death.
  7. That the Office of Fair Trading, REIQ, RTA and relevant industry stakeholders continue their efforts to reinforce the importance of regularly and properly maintaining residential rental properties. This requires commitment from:
    - (a) tenants to promptly report and document emerging maintenance and repair issues;
    - (b) letting agents to comply with their obligation to promptly report those issues to, and seek instructions from, the lessor; and
    - (c) lessors to diligently consider those issues and respond promptly and appropriately to them, preferably with the assistance of licensed contractors.
  8. That consideration be given by the Office of Fair Trading to implementing a requirement that real estate agents become members of a peak body or association which is charged with the responsibility of providing guidelines, a uniform code of practice and the provision of continuing professional development to its members, including the issues raised as a result of this tragedy.
  9. That REIQ and other training bodies in the Industry highlight with real estate agents the importance of maintaining open contact with landlords and provide training on problem solving strategies in this regard.
  10. That the Department responsible for administering the *Property Agents and Motor Dealers Act 2000* and the *Residential Tenancies and Rooming Accommodation Act 2008* amend the relevant legislation to require Real Estate agencies to adopt a uniform and clear system of recording complaints received by the real estate agent from the tenant, passing those complaints on in the same terms to the landlord and making it clear that instructions are being sought by a certain date that approval is either given for those repairs and conducted or that the landlord will attend to those issues within a specified period; and that feedback be provided to the tenant as to the result of the complaint.

11. That the Department responsible for administering the *Property Agents and Motor Dealers Act 2000* and the *Residential Tenancies and Rooming Accommodation Act 2008* amend the relevant legislation to require tenanted properties be subject to a mandatory building and pest inspection before a property is rented and at subsequent regular intervals.
12. That the authority responsible for Australian Standards design an Australian Standard to establish how deck inspections should be conducted if it is considered that *AS1720.1 Timber Structure Part 1 Design Methods* and *AS 16894 Residential Timber Framed Construction* do not provide sufficient guidance in this area.
13. That O'Reilly's Real Estate adjust their practices to ensure that termite and building inspection reports or reports of experts in respect of potential or actual safety matters relating to the property are read by the property manager and brought to the attention of the landlord in a timely fashion.

**A M Hennessy**  
Coroner

**19 September 2012**